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The Marquis of Argyle his Defences to the Inditement of Treason against him in the Parliament anno 1661.

THe Defender professes his sense of the mercy and happiness of the Lord that we are delivered from the lawless arbitrary power of the armed force of cruel Usurpers, and have restored to us our only lawful Sovereign Lord, and in his sacred Person, the Authority of Law, the order of legal Judgment, and in them the liberty of all legal Defences, whereupon depends the great Security of the Liberties, Lives and Estates of the Subjects. This gives the Defender confidence to appear in Judgment, nothing doubting of a fair Procedure, and full Hearing, competent time being allowed in all the Dyets of the Process, and all things herein so ordered, as may be surable to the Justice and Gravity of this high and honourable Court, and the importance of the Cause, not only as to the Defenders Interest, but as to the preparative and consequence, and he with much confidence expects all Justice from his most gracious Sovereign, the justest of Princes, and who is represented, and acting by so truly noble a person as my Lord Commissioner his Grace; also hoping, the honourable Court of Parliament, will, without all Prejudice, impartially consider his legal and just Defences; and that they will proceed so fair, without all ground of suspicion therein, that any who is within degrees to persons against whom he is libelled to have committed any of the Deeds which are made the ground of his Dittay; or if any who are conscious to themselves of capital Enmity, or has been any ways Informers against the Defender, or have predetermined by uttering their Judgment already of his Cause, Conscience and Honour will make them abstain sitting and voting therein; so much the more that they see how unwilling he is to propound any reculatory against any Member of the House. Upon these and other grounds in Law, so confident is he of the vindication of his own Carriage, so much he defers to their Ingenuity and Generosity, and so high is the honour he bears to this honourable Court.

The Defences following are proponed by the Defender, under humble Protcstation. 1. That whatever peremptor Defences in the Cause the Defender is to propound, it is adhering to his Dilators, both general against the whole Dittay, and particular against the several Parts, Articles and Members thereof, protesting they may be first discusst, and he assailable *ab hoc libello* thereupon, without further, and that not only because, 1. That order and form of Process ought to be observed. But 2. Because of the great importance of the Cause. And 3. Because of the exceeding great consequence of the Preparative, and that it highly concerns the whole Leidges from the highest to the lowest, that their Lives, Estates, Honour and Interest of their Posterity be not brought in question, but on Dittays found to be clear, distinct, particular, and every way relevant:

2. Protesting, that if my Lord Commissioner his Grace and honourable Estates of Parliament, shall proceed without pronouncing Interloquitor, first, on the Dilators and relevancy of the Dittay (as he hopes they will not) to the discussing of his peremptor Defences *in causa*, and that they find not any of the peremptor Defences that are either presently instructed, or notour *not veritate facta vel facti* sufficient *ad victoriam causa*, yet where there is need (which he is also confident shall not be found needful) that he prove what is further alledged *in facto* and needs no Probation, that in that case there may be a Term assigned him to prove, seeing he did supplicat for Precognition, but your Lordships was not pleased to grant it, and there is no other way of admitting him to prove his Defences *in facto*, which (as said is) needs Probation, but either by way of Precognition or of Litiscontestation, and assigning of a Term for that effect, especially seeing it has been the undoubted Practique of this Kingdom in matters of Treason, the Defender has place to propound his Alledgeance for clearing of his Innocency, and gets term to prove it, which is also consonant to the civil and common Law, and is agreeable to Reason and Equiry, and is the practice also of other Nations, which Protestation the Defender humbly makes in this place once for all, lest he should trouble your Lordships with the frequent repetition thereof at the proponing of every Alledgeance *respectivè*, holding them for repeated therein.

1. First it is alledged, that there can be no Process, nor is the Defender holden to answer, till the whole Libel and all the parts thereof be given him up to see; but so it is, the Commissioners Instructions for Addressee sent and made to his Majesty by the Defender (as is alledged,) and the Commissioners at Breda, are expressly repeated as a part of the Libel *brevitatis causa* in the 10 Article, and yet the samen has not been produced, nor given up to the Defender to see and advise with; till which be done, he cannot be holden to answer. Likess, where Points of the Dittay are founded upon Writ, the Defender craves that he may have up the Writs whereupon the samen are founded, to see before he be holden to answer to the Dittay, whilk is very consonant to Law, l. 1. §. 3. ff. de edendo, ubi edenda sunt omnia quæ actor editurus est apud judicem, & l. 3. Cod. eod. whereby the Pursuer is ordained to show to the Defender all that he will use against the Defender before the Judge, otherwise the Defender cannot prepare himself for his Defence, which is the reason given in these Laws, Paulus lib. 5. cent. 16. and the Doctors through the same Laws, & Livinus, §. 9. ff. de quest. Fafon post alios, lib. 2. num. 3, 4, 5, 6. Cod. de edendo. Bart. ad legem ult. num. 8. ff. de quest. But so it is, there are several Articles in this Dittay founded upon Writ not produced, as in the 1st Article, the prosecution of Mr. John Stuart to death as a Leasing-maker betwixt the King and his Subjects is libelled, and yet neither Libel nor Sentence against Mr. John produced. Item, Coll. Henrysons Commission for keeping of Dumbartown Castle is libelled, and the Commission not produced.

Item, The 6th Article, a Capitulation alledged made and subscribed by the Laird of Ardkinglas and other Officers under the Defenders command, with the Laids of Lawmont and Escog.

Item, The Assurance alledged given to the persons within the House of Lock-head, mentioned in the 7th Article, the Defender craves *ante omnia* it may be produced:

Item, That Ordinance of Parliament or Committee of Estates, whereby it is libelled in the same 7th Article, that Colkittoch was ordained to be brought
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fra the Prison where he was for the time, to the Town of Edinburgh. *Item*, in the 9th Article, The Defenders Protestation in Parliament anno 1648. *Item*, In the same Article, the Letter written to Cromwel libelled to be of the date the 6th of October 1648, whereby it is libelled that the Defender and his Complices wrote to Cromwel.

Item, In the same Article, Sir John Cheifly his Instructions libelled, as being dated the 17 of October 1648, desiring the persons taken in the Ingagement to be detained as Pledges of the Kingdoms Peace.

Item, Eod. Artis. The Warrant alledged to be under the Defenders hand for a Proclamation against the Families of Ogilvie and Rat, &c.

Item, Article 10. The Letters alledged written to Cromwel anno 1650, after his Invasion.

Item, Eod. Art. The Act of the West Kirk, with the Declaration whereunto it relates.

Item, Art. 11. The Remission alledged given to John Mackdonald of Dunloch under the Defenders Hand.

All which the Defender humbly alleges ought to be given up to see before he be holden to answer, especially so long a time having intervened between the intention of this Pursuit, and dates of the saids Acts and Papers forefaids libelled on, some of them being 20 years since, some 15, and the least 10 or 11 years ago; as has always been the practice in such Cases, and may be instanced in my Lord Balmerinoch his Process, and was found by this honourable Court in Mr. James Guthry his Process.

Secundo, Under Protestation alwise, that the former Exception may be first discusst, that the Papers therein mentioned *ante omnia* be given to the Defender to see, It is alledged, that as it has been alwise the princely care of His Majesties Royal Ancestors to keep the Laws of the Realm certain *ne dum incerto uteremur jure, fluctuaret respublica*, and least Law, which is introduced for the Lidges Security, should become their Snare. Therefore by King Ja. the first that illustrious Prince Parl. 7: cap. 107 all the Interpretation of His Majesties Statutes otherwise then the sament bears is forbidden, and if forbidden can be no ground of Dittay, and in effect to found a Dittay upon statuts, otherwise then they bear, were to found it upon such statuts as we have not; But sua it is in the Proposition of this Lybel, the Acts of Parliament whereupon the same is founded are otherwise repeated then they bear. For 1, The first part of the Proposition of the dittay founded upon the two first Acts of Parliament lybelled, *viz.* the third Act of the 5 Par. of K. Ja. 1. and the first Act of K. Ja. 6. and does upon the saids Acts conclude the pain of Forefaulture and Treason; The same is most irrelevant, because in the saids Acts there is no mention made of any Crimes of the Nature and Quality lybelled, the said third Act of the 5, Par. Ja. 1. being anent the Fees of Craftsmen and the price of their Work, and the 1. Act of K. Ja. 6. being anent the Constitution of the Earl of Murray Regent. And in neither of the saids Acts, is there any pain or punishment inferred, and so far less can the pain of Forefaulture or Treason be fra the saids Acts concluded against the Defender And if it should be said that the 5. Par. of K. Ja. 1. is mistaken in the Writing for the 1 Par. and in citeing the 1. Act of K. Ja. 6: The Citation of the number of Parliament is also omitted, *viz.* the number 18: The dittay repeats these two Acts otherwise then they bear, for the Words of the said 3. Act of the first Parliament K. Ja. 1. Statutes and ordains, *That no man openly*

or notourly Rebell against the Kings person, under the pain of forfeaulting of Life Lands and Goods, which is not at all in the Libel repeated ; And as to the 1: Act of the 18. Par. K. Ja. 6. the words thereof are indeed, yet with some Difference and Transposition lybelled, but thereto is added the Sanction and pain, *That whosoever does in the contrair are to be punished as Traitors, and to Forefault their Life Lands and Goods*, whereas there is no Sanction or pain in the said Act, only it is declarator of His Majesties Royal Prerogative and of the three Estates to maintain the same.

Item, In the second part of the Proposition of the dittay founded upon the 25. Act of the 6. Par. K. Ja. 2: and the 75 Act 9th Par. 2. M. is not repeated as it bears, as to punishment, for therein they who attempt to do or raise any bands of men of War, Horſe or Foot, &c. without special Licence of Her Majesty and her Successors, are only declared punishable by Death, whereas they are lybelled to be punishable as Traitors, whilk is the pain only of the said 25 Act Par. 6. Ja, 2.

Item, In the next part of the said Proposition of the Dittay founded upon the 43 Act 2. Par. Ja. 1. and the 134 Act of the 8. Par. and the 10. Act 10. par. and the 205 Act 14. par. of K. Ja. 6. none of these Acts are repeated as they bear, but confounded both as to the Crimes and pains therein contained, to a very far different sense (as is humbly conceived) fra that which the saids Acts severally propoerts, transferring the pains of the saids several acts and Crimes therein contained from one to another, as may appear by what follows For the first of those acts being the 43 act par. 2. Ja. 1. is only of Leasing-makers and Tellers of them, which may engender strife between the King and his people ; and the pain of the act is tinsell of Life and Goods to the King, as is clear both by the Title and Body of the act. The 2d act, to wit the 134. act 8. par. K Ja: 6 is also the same Crime, viz. against those that utter false, slanderous and untrew Speeches to the Disdain Reproach or Contempt of his Majesty, his Councils or proceedings, or to the dishonor of his Majesties Parents and Progenitors adding also those that meddle in the affairs of His Majesty or his Estates, & the pain is the pain contained in the acts of parliament made against leasing-Makers and the Tellers of them. The third whilk is the 10 act 10 par. K. Ja. 6. Is against those who speak or Write any purpose of Reproach or Slander against his Majesties person, Estates or Government, or depraves his Laws or acts of parliament or misconstrues his Majesties proceedings, whereby any mislikeing may be moved between his Majesty and his Nobility, and his loving Subjects ; and the pain thereof is only the pain of death And by the 205 act 14 par: Ja, 6: these that hears the saids Leasings, and does not apprehend and reveal the Authors thereof shall incur the like punishment with the principal Offenders, and yet leasing making and telling which is the Crime punishable by the first of those acts, viz. 43: act par. 2, Ja. 1, is punishable by the loss of Life and Goods, to the King, is omitted, and false slanders which is the Crime contained in the 134 act par: 8 Ja. 6. and only speaking to the dishonour of his Majesties Parents and Progenitors, and meddling with the Affairs of his Highness Estate, is repeated out of that Act 134 and joined to the Crime contained in the said Act 10. Par. 10: Ja. 6. and to both the pain is added of losing Life, Lands and Goods, whereas the pain of the said Act 10 is only of Death, and the pain of the said Act 134 Par. 8. Ja. 6: is only the pain contained in the Acts against Leasing-makers, whilk in the said 43 Act Par. 2. Ja. 1. is only the loss of Life and Goods, and not of Life, Lands

Lands and Goods, but allannerly the Escheat of Goods moveable, as may appear 1. Because wherever the pain of tinsel of Life and Goods is found, either in the Acts of parliament or old Laws, Goods are understood Moveable ; As is clear from other Crimes that are ordained to be so punished, as man-slaughter by the 43 Statut Rob. 3. is prohibite under the pain of tinsel of Life and Goods, where *Skeen* explains that these Goods are to be understood of Moveables, and by the Act 90 Par. 6, Ja. 1. The receipt of him who is fugitive for Slaughter, is forbidden, under the pain of Tinsel of Life and Goods, where *Skeen* expounds Goods to be Goods moveable in his tractat of Crimes tit:2:cap: 6. Par. 4. and so it is clear in other acts of Parliament, that thir two pains are distinct, viz. tinsel of Life and Goods, which is only extended to Moveables and tinsel of Life, Lands and Goods, whilk latter pain in the stile of our Acts of Parliament, is commonly thus exprest, that he who incurs it shall tine and forefault Life, Lands and Goods, as the 31 Act Par. 7. Ja. 2 & *passim alibi* Forfaulture properly relating to Lands, and in the common signification of our Law Goods are to be understood of Goods moveable.

2 More specially it may appear, that the pain of the said 43 Act Par. 2. Ja. 1. whereunto the said 138 A^t par. 8. Ja. 6. relates in the pain thereof, is only the pain of Escheat of Moveables, because the pain of Forfaulting of Life Lands and Goods, is the proper pain of the Crimes that by our Law are declared Treason ; and therefore *Skeen* both in his *Index* of the acts of parliament on the word *Treason* refers the Crimes that are so punishable to the head of *Treason*; as also in his tractat upon Crimes in the end of *Reg. Ma.* But does not at all mention therein the Crime of the said 43. act par. 2. Ja. 1 nor of the 134. act par. 8. Ja. 6. nor of the other acts whereupon this part of the proposition is founded. But in his *Index* has the Crime of leasing making between the King and his people under a head by it self, and therein expressly mentions both the said 43 act Ja. 1, and 134 act Ja. 6, Likeas in the said tractat of Crimes after the Chapters of *Treason* and points thereof cap, 1, and pain of the same, whilk cap, 2, he expressly says, is the tinsel of Life, Lands and Goods, And Declares that he understands by Goods, Moveable Goods, And anent the process and Judge of the Crime of *Treason* cap, 3, where he comes to other Crimes capital of all which the pains are either the tinsel of Life and Moveable Goods, or Life only, or of some less pain, in Body or goods but never of Life, Lands and Goods, as is clear through the whole tractat that follows, and in his 12 cap, anent the Crime of falshood, he has the Crime of leasing making between the King and his people, and the same acts of parliament, viz act 43, par, 2, Ja. 1, and the 205 act par, 14, Ja. 6, and in his 25, cap, he has the Crime of infamous and seditious Lybels, and the said 10 act 10 par, K Ja. 6, cited therefore.

Item, In the last two A^ts of Parliament, whereupon the proposition of the Dittay is founded, viz. the 37 A^t, 2 Parl. Ja. 1: and the 144. A^t, 12 parl. Ja. 6. It is libelled that all Resettlers, Suppliers, or Intercommuners with any Traitors, are Punishable by Forefaulture as the Traitors themselves, whilk is not as the A^ts bears ; for both the Crime and pain libelled out of the said 144. A^t, 12 parl. Ja. 6. The A^t is not simply against those who Intercommune with Traitors and Rebels, but with such as are declared Rebels and Traitors: From all which it follows that the Proposition of the Libel as founded upon the A^ts as they are libelled is not relevant ; and therefore the Defender ought to be Assollied *in hoc libello*.

Tertio, Asto the last part of the Proposition of the Dittay ; The Defen-

der abhorrs so much the Crime therein mentioned, that he thinks any Person who will conceal any Malicious purpose of wronging in the least; far more in putting Violent Hand in the inviolable Person of his Sovereign Lord, were unworthy to Breathe in common Air, let be to be Defended: And he is Conscious to himself of his own Innocencie in any such thing, that he needs no other Defence, But the confident Denial of any Guiltiness therein, either less or more: But before a Practique pass in this Honourable Court of Parliament, of founding a Dittay of Treason upon common Law and Practique; It is under Protestation foresaid, and with all Humility alledged against the Relevancy of that part of the Proposition, as founded upon the said Common Law and Practique, that it is not relevantly founded thereon, in sua far as the 28. *Act*, *Parl.* 2. anno 1640, It is expressly found and declared, that no Persons can be declared Traitors, but after Tryal by the Parliament, or Judge Ordinar; and finding that the saids Persons have contravened a Law and *Act* of Parliament made under pain of Treason, and therefore a Person can not be declared Guilty of Treason on a Dittay founded upon Common Law and practique. 2. *Pena* being *Legis Sanctio*, and the Common Law is known with us to have only *vim rationis non legis*; And therefore no Pain, but especially the highest of Pains, can be founded thereon. And 3. Specially as to Practique, besides the Reasons aforesaid, because *Lib. 1. §. 4. ff. ad senatus-consulti. turpilianum, facti quidem questio in arbitrio est judicantis, pena vero persecutio non ejus voluntati mandatur, sed legis auctoritati asseruatur*: Whence *Menochius* *Lib. 31. presump. Cap. 29. in principio*, says expressly *pena iudici non potest nisi expresse jure sit cautum per l. at si quis, §. divum ff. de Relig. et sumptibus funerum*, and it is the common Opinion of the Doctors that ever when Punishment is not expressly defined in the Law, but is permitted *arbitrio iudicis*, it can not be extended to Death, far less to the pain of Treasons and the foresaid *Act* of Parliament, 28. *Act*, anno 1640, takes away the relevancy of founding Treason upon Common Law and practique as said is. 4. If a Dittay to infer the Crime of Treason might be founded on Practique, either of the Justice Court or Parliament, whilk are two Courts before which Crimes of Treason are judged; yet our Practique is *consuetudo verum ita Judicatarum* as *Craig* defines it *lib. 1. de feudis dreg. 8.* And therefore, to it as to the Introducing of all other *consuetudes*, there must be 1. *Actum frequentia*, reiterated Acts and Practiques *per l. de quibus ff. de legibus, et Bart. Jason, and other Doctors* on that Law, *et per legem 1. cod. qua sit longa consuetudo, et l. an in totum 3. cod. de edif. privat.* 2. *Illud explorandum an contradictio aliquo iudicio sit firmata*, that is, it would be Tryed if Decrees in *foro contradictorio* has been given thereupon; As also, sayeth *Craig dicta, Dreg. 8. in fine*, and if in my choice that ought to be, far more in Crimes, and if in Crimes, yet more in the highest of Crimes, and in all the Concernments of one of the most eminent Peers in the Land. Whilk is clear, for in Matters Civil (how small soever) before the Session a Practique will never be founded on some Decrees, given either for not Compearance, or upon Compearance, where there is little or no Dispute, or it may be great in equalitie in the Advocates of the two Parties. And if in Civils, where the Interest is only *Pecuniarie*; This ought to be much more in libel of Treason as has been said. But sua it is neither in Justice Court nor Parliament, will it be found that it has been frequently Judged, and in *foro contradictorio* in an Dispute where this Defence has been proponed; yea, it may be well alledged, that there can be no Practique

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shewed of either of these Courts where any has been found Guilty of Treason, but in some Act of Parliament made under the pain of Treason as said is: But however, the said 28. *Act, Parl.* 1640, is most clear, which is most agreeable to Reason, and the Law of England very laudable in that Point, as Cook has it in his *Cap. of Treason*; and therefore the Libel as founded upon Common Law and Practique is noways relevant, and the Defender ought to be Affoizied therefra.

Quarto, Every Lybel both by the Civil Law, and Our Law, ought to be clear, distinct and special, but especially in Criminal Lybels, because of the great importance of them, ought to be most clear distinct and special: *jure Libellus in Criminalibus debet esse clarissimus*, says Damhaud, *prax. crim. ca. 3. num. 13.* and therefore *Libellus Criminalis obscurus, parte etiam non comparente, extruditur favore rei*: Baldus in *L. edita num. 10. ca. de edendo alex. consil. 72. col. versic. & licet* Volumn 1. *Hip. Consil. 49. & Batander prax. crim. reg. 6. §. 3. & 4. nec enim debet accusator cum existimationis aliena jactura et discrimine vagari lege si in rem, ff. de rei vind.* So that an obscure Criminal Lybel is inept: and the Defender ought to be affoizied therefrom though he did not oppone his Defence for that effect; But sua it is, this Dittay is most unclear and undistinct, in sua far as, in the proposition of the Dittay, there are many Acts of Parliament lybelled on, being Statute anent divers Crimes, of very different natures, and inferring different punishments; according to the atrocitie of the Crimes: and in the subsumption the Defender is indited for several Crimes, alledged committed by him contrair to the saids Laws and Acts of Parliament in general, without condescending on the particular Acts of Parliament, That the Defender has controverted by committing the particular Deeds lybelled, and sua leaving him to a great uncertainty: Whereas in all Law, Reason, and form of Process, the Defender ought to be certified what Acts and Laws he has contraveened by committing such Deeds: that is, in a multiplicitie of Crimes, after proposing all the Statutes relating to the same Crimes, all the Deeds immediately ought to be subsumed falling under the compass of such Statutes: and thereafter the Acts relating to another different Crime ought to be proposed, and the Deeds falling under the compass of these Acts immediately subsumed, and so throughout the Lybel, whilk is no way done here. But *First*, there be many different Acts accumulat together in the proposition, and then most different Facts accumulat together indistinctly in the Subsumption, not condescending on the Acts by them contraveened: and therefore the Lybel is inept, and the Defender ought to be affoizied therefrae. This defence is further confirmed in Law. 2. Because a Lybel being *syllogismus quidam practicus*, Jason and the Doctors *per Instit. de act.* in Criminal Dittays, the proposition consists in *jure constitutionis*, in the Laws whereupon the Lybel is founded, the minor, in the subsumption of the Facts or Crimes under these Laws, and the conclusion inferring the pain, because of such a Crime, as falling under the Law lybelled on: a very essential part of every Lybel is, *quo iure petatur*, and a Lybel being uncertain in this, is unclear and uncertain in a verie essential part, and inept. 3. In Law a Lybel ought so to be conceived as the Defender may know *actionis speciem*, otherwile is inept, *le. 1. ff. de edendo l. 3. cod. cod.* and may also know *actoris jus*, and that he may deliberat how to defend: But in our cases that arises from the distinct application of the Laws to the Facts *ex quibus oritur*. 4. If such an uncertain Lybel were admitted the De-

fender, because of the obscuritie and uncertaintie of the Lybel; should be prejudged of any certain defence he could make against the relevancie of the same, because the relevancie of it consists in the subsumption of the Facts and Crimes lybelled, under some certain Law, which being condescended on by a distinct subsumption under each Law, of the Crimes that were lybelled properlie to fall under the same, the Defender would alledge, why such Crimes cannot be subsumed relevantlie under such Laws and Acts, whilk he otherwise can not do, in such a multiplicitie both of different Acts and Crimes, as are lybelled in this Dittay, there being not only in divers Articles, but even in one Article oft a great diversitie of the Crimes therein lybelled, as in the 10 and 11. Articles, and through most of the rest of the Articles is most evident, and yet the Defender left in uncertainty, under which of all the Acts lybelled on, the Pursuer intends the subsumption thereof, and sua in an uncertainty altogether how to conceive his defence. And if this be not *maxime vagari cum maximo aliena vita & fortunarum periculo*, it is hoped as it will be found verie evident, so it was never the practice heretofore used in Criminal Lybels, and which that it should not now be sustained, is of universal concernment, and if sustained, might prove of verie dangerous Consequence: And therefore the Lybel as it is now conceived is inept, and the Defender ought to be Assoylized theresrae.

Before the Defender come to his particular Answers to the several Articles of the Dittay, to the effect the Defender his case in his accession to the publick actions of this Kingdom, during the unhappie Troubles, till the Treaty at Breda and His Majesties home coming, may be truly stated; It is humbly craved that the Commissioners Grace and honourable Estates of Parliament may be pleased to remember, that the Kirk and whole body of this Kingdom, entred at first in the National Covenant for defence of Religion, and His Majesties Person and Authority, and mutual defence one of another in maintaining the same, wherein, and in what followed in prosecution thereof, till the Treatie with his late Majestie and Act of Oblivion set down at length, and ratified in the 6 Act of the 2 Parliament anno 1641. His late Majestie did so far acknowledge and approve their Loyaltie, that in the 7. Article of the said large Treatie, his Majestie was pleased to appoint, that at the close of the said Treaty their said Loyaltie should be made known, at the time of publick Thanksgiving in all places, and particularly in the paroch Churches of His Majesties Dominions. And in the said Act of Pacification and Oblivion, is pleased to declare, that their constant Loyaltie in their Intentions and Proceedings should not be thereafter called in question, and that whatever fell furth in those tumultuous Times, whether prejudicial to His Majesties Honour and Authority, to the Laws and Libertie of the Church, or the particular Interest of the Subject might be buried in perpetual Oblivion: and whatever has ensued thereon, no mention should be made thereof in Judgment or outwith. Likeas His Majestie for himself and His Successors promises in *verbo principis*, never to come in the contrair of the said Statute, nor any thing therein contained, but to hold the same firm and stable, and to cause it be truly observed, and these Presents to have full force and strength of a true and perfect Security, likeas thereafter, in Anno 1643, the League and Covenant was entred in with the two Houses of Parliament, (upon the Grounds of the large Treatie) by the Church and whole Body of this Kingdom, propoorting the same ends of the Covenant, for Maintenance of Religion, King and Kingdom: whilk

whilk was thereafter approved be the Parliament in *Anno* 1644, and 5 *Act* thereof, and prosecuted by Wars, both within and without the Kingdom, by the Authority of divers succeeding Parliaments, Church and State going unanimously along together, without any apparent publick difference, till the year 1648: And even then that Parliament 1648 so highly homologate the said League and Covenant, that they declared the breaches thereof to be the ground of their Resolutions of that War, *Act* 4. 7. & 8. and their desires for preventing thereof to be their fulfilling of the same *ibidem*, the necessar qualifications required in all with whom they would join, or whom they would employ either in their Armies or Committees, is, that they be such who were of known Faithfulness to the Cause and Covenant, said *Act* 7. and that they would oppose, and endeavour to suppress the enemies to the Cause and Covenant on all hands, *ibid*, witnessing to the World, that they swerved not frae the Principles contained in the national Covenant, and League and Covenant, and that they resolved closely and constantly to adhere thereunto, and to all the ends thereof, *ibid*. So that at that time there was still no difference as to the Cause and Covenant, any difference being only in the manner, and not in the matter of that Engagement. Thereafter, what Straits this poor Kingdom was reduced to by the Defeat of that Engagement, and how unable it was to make Resistance to that *English* Armie; who in prosecution of their Victory, came to the Borders, and entered the same, is not new to all: where-with the whole Kingdom being surprized with Amazement, and in evident hazard, it was hard in that juncture of affairs, to resolve upon any course for preventing the imminent, or rather incumbens hazard of the Kingdom: Whereupon a Quorum of the Committee of Estates appointed by the said Parliament 1648, were necessitate to take upon them the managing of Affairs, and to sue for Conditions of Peace; not being able to resist by Force (the Flower and Strength of the Nation being broken by the said Defeat) and to accept the same, upon the easiest terms that could be had for the time; which as it was endeavoured upon no other intention, or for any other end, but that which they were constrained to by inevitable Necessity: So at that time it was generally lookt upon as good Service, and whilk at that time was most necessar to evite very great, and otherways, inevitable Evils; being necessitate either to condescend to their Demands at that time, or otherways to have delivered the Persons of all that did prosecute the said Engagement, according to the Obligement of the large Treaty, together with the Forts and Strengths of the Kingdom. The succeeding Parliament for the time in the Year 1649, after Proclamation of his present Majestie did send Commissioners to *Holland*, and afterwards, according to his Majesties desire, to *Brabant*, where there was a Treaty concluded by his sacred Majesty, wherein he was graciously pleased to approve of the said Parliament in *Anno* 1644, and remanent Parliaments and their Proceedings frae the year 1641 preceding the said Treaty; whilk was thereafter ratified by his sacred Majesty and his Parliament at *Perth* and *Stirling*: And after the Royal Example of his ever glorious Father, an *Act* of Oblivion was indulged, whereby all that might be ground of Question, was buried in Oblivion, and pardoned by a general *Act* of oblivion in most full and ample form.

This being the State of publick affairs during the time foresaid, albeit by the first ten Articles of the dittay the Defender is charged with Deeds and publick doings, coming within the compass of the said Approbation and oblivion
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foresaid;

foresaid; yet such firm Reliance has he of his Majesties persisting in his gracious clemencie, which does in his Royal heart so much abound, That albeit his Majesty by his Proclamation dated the 12 of *October* 1660, is pleased graciously to declare that he has remitted to his Parliament the tryal of the Carriage of his Subjects in *Scotland* during the late troubles, that the late troubles has only respect to the time, during the Usurpers Possession, and that Tryal should be taken during that time of the Subjects carriage, the Defender (in all humility) conceiving that it is noways to be supposed, that his gracious Majesty did thereby intend to rip up or revive, or to institute any new Tryal, of old Offences, forgotten and forgiven as said is; especially seing it is not to be supposed that the Bowels of his Mercies should be more straitned to this his ancient Kingdom, to whom he has upon all occasions, given so many signal and recent Testimonies of his superabundant Favour, and who according to their bound Duty to the utmost of their power, with the hazard of their Lives and Fortunes, assisted his Majesty in resisting his Enemies, and opposing their Usurpation, than they are and have been to his Subjects of his other Dominions, to whom, according to his gracious Declarations, he has granted a full and free pardon, frae which few, and those only, the unpardonable Murderers of his Royal Father are excluded; for whom, or any guilty thereof, no punishment can be sufficient: And therefore the Defender in all humility conceives the saids Articles, though libelled, are not to be insisted on.

The Solemnitie of those Oaths, both of Covenant and League, will be as the Defender hopes, pregnant presumptions, to put an end to all Controversie, anent the sincerity of his as of the Church and Kingdom, their Loyal Intentions, for the Maintenance of the Person and Authority of our dread Sovereign, whereunto they were thereby so religiously engaged, and the constant tenor of his Actings, still by vertue of publick Orders and Warrants of Parliaments and their Committees, wherein his Faithfulness in the Execution, was also in the like manner approven, will witness that what he did, was not for any privat intrest, but for the publick ends, whereunto he conceived himself engaged in manner foresaid: Nor was the Defender for continuing those unnatural civil discords, as he did witness by his inclination to an accommodation with *Montrose*, in the year 1645. mentioned after, in answer to the 10 Article, whilk albeit fully agreed to betwixt him and the Defender, yet he could not obtain the Committees approbation thereof, which is an evidence that the Defender had not the chief sway of Affairs, and was always inclinable to peace, Religion being secured. Likeas, the carrying on the Engagement in the year 1648. though the Defender differed in his judgment, as to the way and manner, upon the grounds and reasons hereafter exprest, in answer to the 9th Article, does clearly evince that he had not the chief sway in Publick Actings: And what power and interest he had in the year 1649. He did faithfully (according to his bound duty) improve the same for removing these differences betwixt his Majesty and his Subjects, wherein he was passionately earnest, as shall be made appear in answer to the said 10th Article. And after his Majesties home coming, and during his being in this Kingdom, and thereafter, till the Enemy had fully prevailed; and that by his Articles of agreement he was their Prisoner, he faithfully served his Majesty, and even during his Majesties absence, did always, and still shall retain his loyal duty, and good affection to His Person, Government, and Posterity.

And

And whatever these who are grown up may judge, who only see the unhappy and accidental events that are the effects of the corruption of men, but have not known the counsels and causes, which are the two parts of those things necessary to be known to all who will judge of humane actions aright; events being, for most, uncertain, and the worst of events oft times through the corruption of Agents, or other extrinsical circumstances following upon the best of actions; yet had they been intimately acquainted with the grounds, causes, nature of the actions, and all circumstances while a doing, the Defender in all humility conceives that they would have concurred with the rest of the Kingdom, seeing these proceedings had no native connexion with the sad and unexpected consequences that has ensued.

Article 1. And now to come to the particular Defences, to the several points of the subsumption of the Dittay. And first, As to the first Article of the Subsumption, anent the words alledged spoken at the Foord of *Lyon*, which are Libelled to have been, that it was the opinion and judgment of many Lawyers and Divines, that a King might be deposed, for Desertion, Vendition, or Invasion: And which is alledged to have been meant by the defender of the then Kings Majesty; and the presumptions adduced for enforcing that to have been the Defenders meaning, are some words alledged subjoyned, to wit, Mr. *John* ye understand Latine: It is alledged for the Defender (no ways acknowledging that he uttered any such words) 1. All Criminal Dittays should contain in them at least Year, Month, and Place, otherways they are inept. *Bartol. & dd. ad l. libellorum, ff. de accusatione.* Because amongst other reasons, *diversitas loci, varia argueret facinora*, saith *Batand. Reg. 6. Prax. Crim. post Bugell, &c.* But sua it is, there is no Month condescended on, when the Defender should have spoken these words, and therefore the Dittay in this Article is inept. 2. There is no particular Act of Parliament in the Acts Libelled upon in the Proposition condescended on, which is contravened by the words Libelled; therefore the Libell in this Article of the Subsumption, is general and obscure, and till the particular Law contravened be condescended on, can receive no answer. 3. The speeches as they are Libelled, falls not under the compass of the Acts Libelled on in the proposition of the Libell, to infer any of the pains therein contained; because they are Libelled as the narration of the opinion of others, which is not relevant to infer so much, that the narrator is of that same opinion, except it were also Libelled, that he had declared his homologation, and that he was of the same judgment, which neither is nor can be Libelled; far less is it relevant then to infer a Crime, and so high a Crime as Treason: For suppose the Defender had said, that there are very learned, both Divines and Lawyers, whose opinion it is, that the Pope is the Head of the Church, and that he has power to dispense with the Articles of Faith, to depose Kings (a horrid opinion) &c. And that it is their opinion also, we merit Heaven by good works, and that all *Huganots* or Protestants are damnable Hereticks, and that he had related their words in Latine, as the Latine of that Verse of the Gloss of the Canon Law, *cap. sicut de excess. Prælat.*

Restituit Papa solus deponit, &c.

Articulos solvit:

And had said to Mr. *John Stuart* thereupon, Mr. *John* you understand Latine, albeit these opinions of these Divines and Lawyers be execrably Heretick,

yet no body will say that the Defenders relation of them would have inferred him to have been guilty of the same: No more in our case, can the relation Libelled infer him to have been of that opinion with those Divines and Lawyers, or in any way thereby to have contraveened any Act of Parliament Libelled. 2. The foresaid opinion is Libelled only to have been related *in abstracto*, nothing of our Kings Majesty who then was: And whereas it is Libelled, that it appears the sense and meaning thereof appeared to have been of the then Kings Majesty, in so far as the Defender subjoyned to Mr. John Stuart the words aforesaid, that he understood *Latine*. 1. The Libell in this part is ambiguous, for this may be interpret either that it was the meaning of the opinion of those Divines which he related (this seems to be most consonant to the words) or else that his own meaning was, that it was his judgment that the then Kings Majesty our Sovereign might be so dealt with, as is Libelled in the latter part of this Article, and so the Article in this part thereof is ambiguous and inept, and there ought to be no Process thereupon, *Nam libellus in Criminalibus presertim nihil ambiguitatis vel obscuritatis continere debet per. Cap. Constitut. 6. ext. de relig. don.* But 3. If it be understood in the former Sense, it is but still relative of the Opinion of others, and if in this latter Sense, *to wit*, that it was his own Judgement: The Presumption libelled of what he spoke to Mr. John Stuart is noways relevant to infer it. 1. Because they have a more obvious meaning, *to wit*, that it might have been the Opinion of those Divines and Lawyers, was related *in Latine*; and indeed, *Grotius* and *Borlams*, who write of that Subject are both in *Latine*, and that he had subjoyned to Mr. John Stuart, Mr. John you understand *Latine*. Or, 2. That such Opinions being rather the Fancies of notional School-Men, otherways not unlearned in their own Art; Or of such as are Doctors Notionals in the Law (if there be any of such Opinions) rather than of solid *Juriconsults*, who for most do not so much as move these Questions not to be moved. 3. If any such words had been spoke to Mr. John Stuart, they might have had this more probable proverbial Sense, some Lawyers and Divines are of that opinion, but the Subtilty of such Questions or Opinions is *Latine* to me; that is, I understand it not (as we say commonly of things that we understand not, it is *Latine* to me) But Mr. John ye are a Schollar, and ye understand it: Now it is a Rule in Law, that where the Meaning is doubtfull or obscure, that which is the most favourable Sense should be followed, *l. 9. ff. de reg. Juris*, and *Mathew de afflic. decis. 265. Num. 68, 69. et decis. 307. 11. and 15.* and when words are ambiguous, the Declaration of him who utters them should be acquiesced unto, *Menochius consilio 197.* and the Defender is ready to declare, that if ever he had spoken such words, he was very far from any such meaning as is Libell against him. Nor 4. Is it any way presumable, that any rational Man who had the Honour to know His late Majesty, could have made application of any of these three cases to so worthy and illustrious a Prince; seeing the saids *Grotius*, *Bart.* and others, that writes upon that Subject acknowledges (yea, it is obvious to common Sense) that hardly can they fall out in the worst of Princes, if he be but *compos mentis*. And as to the Presumption that follows, that the Defender meant by the late Kings Majesty, because of the Condition wherein the Kingdom was for the time. 1. It is far more presumable, that the Kingdom was in such a Condition of Affection to his Sa-
cred

cred Majesties Person and Authority at that time, that none durst have uttered what might have Reflected thereupon: Seing it is Libelled, to have been shortly after the subscribing of the Covenant wherein they had solemnly bound themselves by the Oath of GOD, to maintain His Majesties Person and Authority. 2. His Majesty by His Royal Judgement in the Act of Oblivion 1641; has presumed the Loyalty of his Subjects, both in their Intentions and Proceedings in these times, whilk is *presumptio juris et de jure*.

As to the Defender his prosecution of Mr. John Stuart. 1. It was a judicial Process, and legal Act, and so can be no imputation to him, wherein the Process was led in so fair a course in Law, that he was condemned not only upon clear Probation, but his own Confession; and yet the Words whereupon he was Indyted and convi&t, were far different from these Words as they are here libelled, and reflected upon the Parliament, otherways the Defender would never have pursued it.

Ultimo, Adhering always to the Alledgeances above-proponed, humbly protesting that they may be first discusst, and whereupon it is craved he may be Assolizied *in hoc libello*, *Absolvitor*; because not only by Act of Parliament in anno 1641, amongst the unprinted Acts Num. 70, the said Service is approven, and he Exonered: But also, the Defender ought to be Assolizied from the whole Crimes in the first Article, because after the time libelled of the alleadged Committing of the same; His late Majesty of glorious memory granted that never to be forgotten, Act of Indemnitis and Oblivion in anno 1641, whilk did proceed upon the preceeding Treatie with his Majestie, and whilk is solemnly confirmed by His Majesty himself in Person, and his three Estates in his Parliament 1641, 6th Act thereof, wherein his Majesty for himself and his Successors, does promise *in verbo principis* never to come in the contrair of that Statute and Sanction, or any thing therein contained. But to hold the same in all points firm and stable, yea, and to cause it be truly observed by all his Majesties Leidges for ever: Hereupon the Defender doth confidently rely, for all that is libelled as committed by him in this Article, or any other preceeding that time, as being confident, it is the greatest imaginable Security that he, and the rest of the Leidges of the Land who are concerned, can have.

Article 2. As to the second Article, and haill Heads thereof; 1. Neither Day, Moneth, nor Year of GOD are condescended on, and therefore so general that it is inept. *Nam generalitas parit obscuritatem*, Marant. part 6. *speci& de libell. oblat. et quomodo concip. et per Textus 161, citatos*. 2. It is not condescended which of the Acts of Parliament libelled this Article, and the severall Headsthereof contraveens, whilk is a general Ineptitude and nullity in this Libel. 3. As to the first point of that Article anent the Intaking of the House of Airlie, cutting and destroying the Planting, and Dimolishing the House. 1. It is not relevantly libelled, in sua far as it is libelled that the House was kepted for his Majesties Service, but does not condescend what Service. Nor 2. Is it libelled that there was any in it that had Commission from his Majesty, without which it has not any cullor of Relevancy. 3. The Defender never had any private Quarrel, nor personal Prejudice against the Noble Lord James Earl of Airlie: But if his Marching to that House be meaned of that which was in anno 1640, it was by vertue of, and in obedience to an Commission put upon him by the Committee of Estates for the

time; nor was the said House at his arrival thereat kept for his Majesties Service, as is (though wrongously) libelled; but before that time, was Surrendered to the Earl of *Mentrose*, who had put Colonel *Sibbald* to keep the same for the King and Countries use; and which Colonel *Sibbald* upon sight of the Defender his Commission, did abandon the said House; and if there was any Planting cutted, it was allanerly some few Shrubs & Bulbes (whilk the Defender could not hinder) for flutting to the Souldrie, and though the Defenders Commission bare Power and Warrant to Demolish the House, he was so far from stretching or fully Executing the same, that he did only slight the House and delayed a long time to do the same, in expectation, that the Lord *Ogilvie* should have procured a Countermand from the Committee, and did not slight it till he was past all hope of obtaining the same: As is hoped will be acknowledged by the said Noble Lord. Neither did (sua far as the Defender knew or could hinder) the Earl his Friends and Followers sustain any Prejudice other than what was usual, and what all places are ordinarily obnoxious to, where Armies or Parties of Souldiers comes. But however it is not Relevant as said is.

Tertio, That part of the said Article, though it were true (as it is not) is no ways relevant, to infer the conclusion of the Dittay, there being no Law nor any Statute libelled on, that for cutting of Timber or demolishing the Houses of privat persons, though done upon privat quarrels (as this was not) infers the pain of Treason.

As to that part of the Article, anent the burning of the House of *Forshar* beside the exceptions against both the points thereof alledged of before in the begining, it is not relevant to say, that the Defender seized thereupon, to infer any Crime, except it were libelled he seized by force, for he might have entred *in vacuam Possessionem*. 2. *Non relevant* to lybel that those under him did seize thereupon, or raise Fire therein, except it were libelled that the Defender had given exprefs order, and warrant to raise wilful Fire, who as he gave no order therefore; so he was not present nor near the place nor knew any thing thereof till after the House was burnt, and *non caput sequitur*. 3. In the Acts of Parliament libelled anent burning and wilful Fire raising, the samen can only be understood of burning and raising Fire on privat Feeds, and for particular Revenge in time of Peace: and is not so to be extended to such Deeds done in the heat and fury of Wars, seing *inter arma silent leges*. And as to the aggravation of the Defenders hatred against the Earl, meerly for his loyaltie to his Majesty, it is *gratis dictum*, and against the presumption, *qua unusquisque prajumitur bonus*, and against that loyaltie to His Majesty which is hoped shall more and more appear in the Defender: 4. The Defender oppen: his Commission, Act of Exoneration, and Ratification thereof in Parliament in anno 1641.

Lastly, The Defender ought to be *Assoylized* frae the said Article and all Deeds therein mentioned, because the same preceeded the Act of Oblivion anno 1641, whereby all things that did fall furth in these tumultuous times, whether prejudicial to His Majesties Honour and Authority, or to the Laws and Liberties of the Church and Kingdom, or to the particular Interest of the Subject, are buried in perpetual Oblivion, as more fully is contained in the said Act.

Article 3. As to the third Article anent the besieging of *Dumbarton Castle* and Transporting Cannon and Ammunition out thereof,

It is alledged for the Defender, 1. That the assaulting of the said Castle is not relevant to infer the conclusion of the Dittay, because as is before alledged, none can be declared Traytors, but those who has contravened a special Act made under pain of Treason. But so it is, that none of the particular Acts of Parliament whereupon the proposition is founded, mentions any thing against those who assaults the Kings Castle, nor does any of them infer the pain of Treason therefore, but only the 25 Act of the 6 Parliament, Ja. 2. Intituled sundry points of Treason, by the which Act they only are to be punished as Traytors who assaults the Castle or Place where the Kings Person is, and that without warrant of the Estates; but it is neither lybelled neither was the Kings Person in the Castle the time of the alledged assaulting thereof; nor did the Defender assault or lay Seige to the same without warrant fra the Estates, but by their exprels Order and Commission. And the truth is, the Defender himself did not appear before the said House, till the said Sir John Henryson being straitned with the Siege, sent for the Defender and offered to surrender the House upon honourable Conditions, which the Defender suffered him to make himself, and which were accordingly kept not without some difficulty; the Inhabitants of the Town, by reason of prejudice done to them being highly incensed against the said Collonel.

As to that part of the said Article, anent the Transporting of the Kings Cannon and Ammunition, *non relevant* to infer the conclusion none of the Acts lybelled on, concluding against any such Fact, the said Crime of Treason. And the truth is, the Defender did never Transport any Cannon or Ammunition furth of the said Castle, but two Cannons which the Duke of Richmond heretable keeper thereof gifted to the Defender, and which he would never have gifted, if they had not been his own and not the Kings. 2. The Defender ought to be assoylized fra the the said Article and all Deeds therein contained, the samen having also preceeded the said Act of Oblivion in anno 1641.

Article 4. As to the fourth Article of the Dittay, anent the Defenders calling or causing to be called a Convention of Estates in anno 1643, entering in League with His Majesties Enemies, imposing Excise and Subsidies on the people, raising an Army, entering England therewith, and Fighting with and for the Rebels there. It is answered, that the whole points in this Article of the Dittay are charged personally on the Defender, so contrary to the Notoriety of the matter of the Fact, known to both Kingdoms, and to His Majesties Commissioners Grace and the whole honourable Parliament; yea, and to the 5. Act of Parliament 1644, relating and approving all those Acts that are made points of this Article, that there needs no more, but propone as known to all, and repeat out of the said publick Law and Act of Parliament what is therein lybelled, to evince that they are not the Defenders personal Deeds; but the Council and Commissioners established by his Majesty and Parliament in anno 1641, Convention of Estates, and of the whole Church and Kingdom of Scotland, all approved by the said Parliament 1644, in the foresaid Act 5 thereof. 1. Then as it is notour, so it is clear by that Act, that the said Convention of Estates was called, not by the Defender, as is libelled, but by his Majesties privy Council, Commissioners for conserving of the Articles in the Treaty therein mentioned, and Commissioners of common Burdens, all established by his Majesties Authority in Anno 1641, which Conservators considering that Article in the large Treaty, bearing the Kingdom of Scotland their desire,

for Unity in Religion; and uniformity in Church Government, as a special mean for conserving Peace betwixt the Kingdoms. In answer thereto, his Majesty, with advice of both Houses of Parliament, doth declare, his Approbation of their Affection in their desire of having conformity of Church Government between the Nations: And as the Parliament had already taken in to consideration the Reformation of Church Government, so they would proceed therein in due time; and this was one of the main Grounds whereupon both Nations entered in the said League and Covenant. 2. That the enacting and entering in the League and Covenant, was an Act of the Convention of Estates, not the Defenders personal Act. 3. That the League and Covenant was entred in with the two Houses of the long Parliament, and assistance given to them in fighting with, or for their Armie, or otherways, which is libelled fighting with the Rebels, the point of Fact being thus cleared in opposition to the dittay. 4. It is alledged, That the first two Members of this Article is subsumed under none of the Acts of Parliament libelled on in the Proposition, there being no Act of Parliament libelled against Meetings, or Bonds and Leagues in general; or in special betwixt the two Nations or Estates thereof. 5. As to the remanent Members of the Article, they can no ways be relevant (with all submission) except it were qualified, that the two Houses of the long Parliament, to whom the Assistance libelled was given, that they were Enemies and Rebels; but that the Defender is confident will not be said, because by his Majesties Act of Oblivion, 25 April, 1660, his Majesty after his happy Restitution, declares, that what was acted even against his Majesty and his Royal Father, by his Subjects in England, during these times thereafter shall not be called in Question at all, so much as to the prejudice of their Reputations in manner at more length contained in that gracious Act: And how loyal the long Parliament was, did appear in that the Usurper durst never attempt any thing against his late Majesties Person, until they were broken: As also what loyalty the secluded Members of that long Parliament has (as became them) shewn to his Majesty, in his just and glorious Restitution, is known to all Europe, to their eternal Commendation and renown no doubt as from conscience of their Oath, and duty of Alledgeance, so of the Oath of God whereunto they bound themselves to maintain his Majesties Person, Authority and greatness, also well as Religion in that Covenant. 6. All the foresaids deeds which are the Members of this Article, viz: the calling of the said Convention of Estates, as being the Act of the foresaid Council and Commissioners, the entring in the league and Covenant, raising of the Armie for assisting of the two Houses of the Parliament of England imposing excise, &c. as being all Acts of the said Convention of Estates, together with the same Convention of Estates, are all approved by the said 5 Act of the said Parliament 1644, and the said League and Covenant is owned and acknowledged as a publict acting by the 4, 7, and 8 Acts of the loyal Parliament 1648. In respect whereof the Defender ought to be assoilzied frae this whole Article, and all the crimes contained therein. 7. Not only is the calling of the said Convention of Estates, and the said Conventions entring in the League and Covenant, imposing of Excise, raising the forces for the Parliament of England, and remanent Acts of the said Convention approved by the foresaid 5 Act of Parliament 1644, but by his Majesties Treaty at Bredah, and the Act of Approbation and Oblivion in the Parliament holden at St. Johnstown and Stirling in Anno 1650, and 1651, or either of them, all things done during these tumultuous times intervening betwixt

twixt the said Act of Oblivion in Anno 1641, and his Majesties home coming in Anno 1650, whether prejudicial to his Majesties Honour and Authority, or to the Laws and Liberties of the Church and Kingdom, or to the particular interest of the Subject, are buried in perpetual Oblivion; and by the said Treaty and Act of Ratification of the said Parliament, or an or other of them, the said Parliament 1644, and hail Acts therein are ratified, and so amongst the rest this, which is the first Act, whilk approves all the Acts whereupon this 4 Article of the Dittay is founded, and therefore the Defender ought to be assolizied therefrae.

Article 5. As to the fifth Article, anent the burning of the house of *Menserie* in Anno 1645; The Defender is so innocent thereof, that if it were libelled relevantly, he needed no other Defence, but a simple denial: But the truth is, that it has been burnt by some of the Soldiers commanded by General Major *Baillie* for the time, upon the greatest provocations that could be, two Parochins, viz. *Muckers* and *Dolor* having been burnt the night before; and several old men who were not in Arms murthered, and Women hurt and deadly wounded by the concourse of these that were in that House and their Complices: But it is noways relevantly libelled, in swa far as it is libelled, that the Defender or others under his Command burnt it. 1. Because there is no Act of Parliament of all the Acts libelled upon in the proposition, whereupon this can be subsumed specially the Acts anent raising of fire, upon which (if upon any, it seems it is particularly founded, there is no such odd extension of that so high a crime, as to make any guilty of it by the committing of it by others who are under their Command: and this were of very universal terrible concernment, and in the present case were most dangerous and unjust, that a commander should be holden to answer for all the illegal deeds done by his Soldiers, without his command or order. 2. It is against common Reason and common Law, by which this therefore is well established as an uncontraverted Rule, That *delicta proprios tenent autores & noxa caput sequitur*. And therefore it is only relevant that the Defender burnt it by himself or others, by his special direction or particular Order for that effect. 2. Though it were made relevant in manner foresaid, yet the Dittay is inept as to this article, and the Defender ought yet to be assolizied therefrae, because the Year of God is only libelled, to wit, the Year of God 1645, whereas not only the Month, as in all criminal Libels per *l. libellorum ff. de accusationibus*, and the Doctors writing thereupon, but the very day ought to be condescended on: For where the omission of the day prejudices the Defender of his Defence, specially of his *alibi*, whilk he might and would propone, if the day were condescended on that being required, the day ought to be condescended on, otherwise the Libel is inept. *Nam libellus debet continere non tantum annum & mensem sed & diem, si reus id requisierit, cum probaturus suum alibi*, Damhaud. cap. 3. num. 4, 5. & Batander. Reg. 6. num. 40. Macanta. in Spec. de libell. ablat. num. 12. per Bart. in l. si quis reus eolum 3. n. fin. ff. de publ. judic. & Jason in l. arbitrar. 2. §. si quis ff. de eo quod certo loco. But swa it is if the day were condescended on of the said Burning, the Defender might, and if need were, will offer him to prove, that he was that day, during all the time of the Burning, *alibi*, at a considerable distance from the said place, adhering alwise to the former Defences against the aptitude and relevancy of this part of the dittay, and protesting that the same may be discuss *ante omnia*; The

Defender ought to be assolizied *ab hoc libello*, at least there can be no proces upon this part of the dittay, as it is now lybelled. 3. Absolvitor, because Lieutennent General Baillie, at the time when the House was burnt had command of the saids Forces; by which Forces the said House was Burnt, and his whole Service in the said Expedition is approven and he exonerated by two several Acts of Parliament *anno* 1645, one in the 4 *Ses.* of the said Parliament at *erth*, another in the 5 *Ses.* of the same Parliament at *Perth*, both mentioned in the Index of the unprinted Acts. 4. Albeit the Defender had burnt or given direction to burn the said House, as he has not, yet by special Act and Commission of Lieutennendrie granted to him by the Parliament 1644, he was impowered to pursue the Mackdonalds and their Adherents and Accessors with all kind of Hostility by Fire and Sword, with a Dispensation of all Slaughters, Mutilations, raising of Fire, effaying of Houses, taking of Prisoners and other inconveniencies whatsoever, should fall out in the Execution of that Commission in pursuing of them, as the said Act and Commission at more length bears; And whilk Commission is ratified by his Majesty in the Treatie at Breda in his Ratification of that Session of Parliament 1644, among the other Parliaments and Sessions thereof, ratified by his Majesty all after 1641 and preceeding his Return; But *sua* it is that the said Mackdonalds were at the time of the Burning of the said House, joined with Montross, and it was in pursuance of both that the said House was Burnt, as is not-tour, and if need beis, the Defender will offer him to prove; And therefore tho he had Burnt or given Direction for the burning thereof, he ought to be assolizied.

5. By Act of Parliament 30 *Act* 22. March 1647, It is statute and Ordained That all his Majesties good Subjects shall be altogether freed and liberated in time coming from being anyways called, conveyed, pursued, troubled or molested in Judgment civil criminal or out with the same for any deed done or to be done by them against the persons, Lands or Goods of such as has been or shall be in the Rebellion (by which it is not-tour that the said armed opposition made by the deceased Marquis of Montross, and the saids Mackdonalds and others under their command, to the Estates is understood) during the time of their being in the said Rebellion, and have been or shall be guilty with the Rebels in their wicked Courses, or of any of them who came under the first and second Classes of Delinquents contained in the 5 Act of the 5 Session of that Parliament holden at St. Andrews in the Month of January 1646: But *sua* it is the Defender offers to prove, if need beis, That a Son of the Earl of Stirlings named Charles or John Alexander who had Right to Menstrie had joyned with Montrose and those under him, and so came under the second Class of the said 5 Act of the 5 Session *Parl.* 1646, or at lest went or sent into their League or without Compulsion intertained them in the said House; and therefore the Defender ought not to be pursued even though he had Burnt or given direction to burn the said House [as he in no ways did] and being pursued ought to be assolizied from this article; Likeas it is *conjunctim* alledged for the Defender in Fortification of the said Act that the same is ratified by his Majesties Treaty at Breda, as being one of the Acts of that Session of Parliament 1647 which amongst the other Sessions of Parliament and Acts thereof since the year 1641 and preceeding his Majesties return in *anno* 1650, are ratified by the said Treaty; As also by the Act of Ratification at St. Johnstoun or Stirling in *anno* 1650 or 1651, by the which Ratification or Ratifications of his Majesty by the Treaty aforesaid, the said

said Act of Parliament 30 in anno 1647 comes as a most solemn Remission granted by his Majesty and hail Estates of Parliament to the persons therein contained : and sua likeas if every one of them had got a particular Remission so solemn, it had been an inconvertible Remission, for what were therein contained, so must it now be, being in effect of that same nature and verue, albeit many be included in one.

6. By the Act of Oblivion at St. Johnstoun or Stirling in the year 1650 or 1651 all Acts of Hostility whether between the King and his Subjects, or between Subject and Subject, or whar things had fallen out in these times, betwixt the year 1641 and his Majesties return, wherher prejudicial to his Majesties Honour and Authority or to the Laws of the Kingdom, or to the particular interest of his Subjects are buried in Oblivion; In respect whereof, though the Defender were accessory to the said Burning, as he is nor, yet he ought to be assoilzied.

Article 6. As to the sixth Article anent the taking of the House of Towart belonging to the Laird of Lawmont and the house of Escog, belonging to Escog, and after Articles of Capitulation, drawn and subscribed by Arkinglass and others under his command, under Trust and assurance Murdering a great many of Lawmonts and Escogs Friends. As this is no ways true, the Defender being altogether innocent thereof, so it is no ways relevantly Lybelled. For 1. Neither day nor Moneth of those deeds are condescended on. 2. The alternative by others under his command, is not relevant to infer a Crime, far less Treason against the Defender for the reason contained in the first answer to the former Article, viz. that there is neither Act of Parliament lybelled nor common Law ordaining a man to be lyable to a pain, far less to the highest of pains, for deeds or Crimes by those under his command, except he gave them special Direction, but every one is to suffer for his own fault, as at more length is contained in the said Answer whilk is here repeated. 3. *Non relevat* these for whom he is answerable for the same reason, because every one is answerable for his own fault and Crime. 4. *Non relevat* that others whom he might stop did it, because there is neither any Act of Parliament lybelled on ordaining any to be answerable for all deeds of these whom he might stop specially the Act against Murder under Trust, bearing no such thing; Nor is there any Law or Reason for the same but *delicta proprios tenent autores*, as has been said, and no ways granting the Defender could have stopped them, for the truth is he could not, and was not near them when what is libelled was done; and albeit indeed it be against the duty of Charity not to stop any doing of Mischeif, if one may safely do it, yet that it comes under the compass of Law to infer a Crime, especially Treason cannot be affirmed. 5. Taking of the House of Towart and Escog is not subsumed upon any of the Acts of Parliament libelled, there being none of them anent the taking in of Houses belonging to the Leidges, and swa is not relevant to infer any of the Crimes contained therein. 6. The alledged killing of a great many of Lawmonts and Escogs Friends after the assurance given by Ardinglas, is no ways relevantly libelled to infer the Crime of Slaughter under Trust, because by the Act of Parliament, *Ja. 6. Parl. 11. cap. 51.* of Slaughter under Trust, upon the which it is founded, Slaughter under Trust is only when the Party Slain is under the Trust and Assurance of the Slayer, which is no ways here libelled,

but that the persons who are libelled to have been slain by the Defender were under the Trust of another, to wit *Ardkinglas*, who if he or any other under the Defenders command have done any thing against their own assurance, they are to answer for it. 7. The Defender adhering to the Defences, and craving that they being against the relevancy be first discusst, repeats his former Answer founded upon his Commission of Lieutenantry therein mentioned, for thir who are designed *Lawmont* and *Escogs* Friends, were the *Mackdonalds* or their Adherents and Accessors, as is noutour, and the Defender (if need beis) offers to prove it, whom by the foresaid Commission he had power to prosecute with Fire and Sword, with dispensation of Slaughter and raising of Fire in manner at length contained in the Commission, whilk amongst other Acts of the Parliament 1644, is ratified by his Majesty in his Treaty at *Breda*, as is alledged in the said answer whilk is holden herein repeated, and therefore the Defender ought to be assoilzied from this Article, and truely what cruelty was exercisid, was by the Laird of *Lawmont* himself against the Heretors and other Inhabitants of the Sheriffdom of *Argile*, before any thing at all was acted against him, for the which, upon a Supplication given in to the Kings Majesty and Committee of Estates at *Stirling* in August 1651, he was imprisoned within the Castle of *Stirling*, till after tryal Justice should have been done upon him, but was released by the *English* when they took the Castle with the other Prisoners. However, the Defender is confident, as it is known, so he shall make it appear, if need beis, in the other Process whereunto this relates, and wherein it will be more pertinent, and yet the day and time of the committing of the Deeds mentioned in this Article being condescended on, as it ought to be when required by the Defender, that he may propone his defence of *alibi*, that he offers to prove if need beis, that he was *alibi*, or in another place the time of the committing of the said Deeds at a very great distance, to wit, in *England*. Likeas, his Majesty. by his Treaty at *Breda*, has ratified and approven the Acts of Parliament, and his Majesty and Estates of Parliament has ratified the said Treaty, and past an Act of Oblivion of all former Deeds done by his Subjects, which indemnifies and secures them for any former Actings, in respect whereof he ought to be assoilzied.

Article 7. As to the seventh Article, made up of several Members or Parts, as first, Anent the Men alledged murdered at *Loch-head* and *Dunnawertie*. 2. Anent the aggravation added thereto, anent an old Man begging his Sons life, and denyed him. 3. Anent the sending 200 Men from *Yla* to starve in *Jura*. 4. Anent the taking of the person of *Colkittoch* out of an Ship in *Leith Road*, wherein it is libelled that he had been brought by order of Parliament.

It is alledged against this 7th Article, That 1. The first part thereof (anent the Men alledged murdered at *Loch-head* and *Dunnawertie*) is no ways relevant, not only in respect that the particular days and months whereupon the samen should have been done, are not condescended upon, but also in respect there is not one particular person by Name and Sirname whereby he might be known condescended upon, against whom the Deeds libelled should have been committed, without the which this part of the Article cannot be sustained as relevant, it being contrair to all Law and Practique, that Murder in the general, without naming the persons murdered, should be sustained as a relevant Dittay against any. 2. The Slaughters alledged committed upon these

in the House of *Loch-head*, is not relevantly subsumed upon the Acts of Parliament libelled, in so far as there is no assurance libelled to have been given to them to bring it under the act of Murder under Trust, and there is no other Act libelled under which it can fall. 3. It is alledged, that the Defender cannot be charged with any of the Deeds libelled in the said first part of the Article, (though they were true and relevantly libelled, as they are not,) because the Expedition made against the Rebels in *Kintyre* in the year libelled, was by *David Lesly* and these under his Command, against such, who contrair to his Majesties order, sent to them at that time, commanding them to lay down Arms, and declaring that if they did not, they should be out of his Protection, and contrair to their own Engagements not to joyn with *Alaster Mackdonald*, did not withstanding continue in Arms, and Rebelliously (as was then declared by the Estates of Parliament) resisted *David Lesly* in the execution of his said Commission against them, who therefore, after the defeating of them in the Fields, took them out of the said Houses of *Loch-head* and *Dunnawertie*, without any Capitulation, and disposed of them as the Council of War then present with him thought fit, whilk is nortour, and the Defender offers to prove if need beis, for the which and other his Services, the said *David Lesly* got the Parliaments Approbation in anno 1648, as the said Approbation and Exoneration bears, whilk will clearly prove any thing that is herein alledged, and therefore the Defender, nor any in his Company at that time, cannot be charged with any Deeds libelled in the first part of this Article, but ought to be assoilzied therefrae. 4. The Defender repeats his third Defence made to the 5th Article, founded upon his Commission of Lieutenantry, the persons mentioned in this Article against whom the Deeds are libelled to have been committed having been the *Mackdonalds* or their Adherents and Accessories, whilk is nortour, and the Defender offers to prove if need beis to prosecute whom he had the Commission, containing Dispensation, and whilk was ratified in manner mentioned in the said answer. Likeas, he repeats the 4th and 5th Answers made to the said Article, in respect whereof he ought to be assoilzied therefrae. It is alledged against the 2d, 3d and 4th Members of this 7th Article, that they are no ways subsumed, nor cannot be subsumed under any of the Acts of Parliament libelled, and therefore the Dittay herein is inept and the Defender ought to be assoilzied therefrae, and yet in point of fact, they are but meer calumnies. For as to the 2d part (anent the said old man and his son) it is no ways relevant, nor condescending on the persons names, and therefore cannot receive any other answer; but that it is a meer fiction, to make the Defender the more odious, who ingenuously professes that he never heard of such a thing, till he saw it in the Libell. The third part of this Article has no better ground than the 2d; and the Defender desires that for clearing his innocency of the Fact Libelled therein (anent the sending of 200 men from *Na* to starve in *Jura*) that the Gentlemen in the said Isles may be examined upon the truth of the matter.

That which is alledged in the fourth part of this Article anent *Colkittoch*, is of the same nature with the former two, and therefore the simple relation of the truth is sufficient to refute the falshood thereof, which is shortly this, *viz*: That *Colkittoch* was not brought to *Leith* either by order of the Committee of Estates, or Parliament, but being taken Prisoner in *Na* by the Party under the Command of *David Lesly*, and delivered to the Defender, the Defender put him Aboard in Captain *Brown* his Ship, who undertook to deliver him at

Dunstaffage ; But Captain *Brown* finding the opportunity of a fair Wind to *Leith*, to which he intended ; and not willing to lose the same, did not go to *Dunstaffage*, but came straight to *Leith* Road, and immediatly gave the Defender notice that he had his Prisoner Aboard, whom therefore the Defender received from him, and sent him to *Dunstaffage* ; And the Defender desires that Captain *Brown* who lives at *Weyms* may be Examined upon the truth of this matter, by whom he offers to prove this, if need were. And whereas it is Libelled that *Colkittoch* was hanged, it is true ; but it is als true that he was condemned to die in a Justice or a Lieutenant Court Judicially, which is not-tour ; and the Defender offers to prove, if need beis, & *stat sententia*, & *facit jus* ; so that this can be ground of no Crime nor Dittay whatsoever ; but however the Defender ought to be assoilzied therefra : And it is knowin that *Colkittoch* was condemned to die for several murthers, slaughters, and hainous Capital Crimes, even when he had not the least colour or pretext of being in the Kings service.

Article 8. To the first Member of the eighth Article, bearing, that notwithstanding of the manifold Acts of dignity, favour, honour and trust conferred upon him by his then dread Sovereign, his Majesty being redacted to great straits by that Army of Sectaries ; and having cast himself over in the hand of the Army of his *Scots* Subjects for shelter and preservation of his Royal Person, nevertheless the said Marquess being chief Ring-leader of that factious Party, who then swayed the estate of Affairs both in Council and Army, did so contrive and complot, and by his influence so prevail, that after all fair offers made by his Majesty, and his desire to have come and lived in *Scotland*, till all differences in both Kingdoms had been settled, and an Act of Parliament was made for abandoning his Majesty to the mercy of his inveterat enemies, the said Army of Sectaries.

It is answered, that as he must continually acknowledge the late King, and his present Majesties acts of favour, honour and trust, so must he still deny, as he safely may, in the presence of God, who is the searcher of all hearts, and of all men, that he never intertained any disloyal thought, or contrived any treasonable plot or machination against his Sacred Person, Dignity, or Authority of his late Sovereign, or of his present most Sacred Majesty, and therefore with a clear Conscience may answer this dittay. 1. That the samen is not special or clear, but very obscure and general how and in what manner he was chief Ring-leader of any factious Party. 2. Who that factious Party were. Nor 3. By what deeds, and how he swayed the state of Affairs. Nor 4. These means by which, and upon whom he procured his influence to prevail. 5. The alledged offers made by His Majesty are not expressed, and therefore the saids Articles are altogether general and inept.

2. The Act of Parliament which the Defender is alledged to have procured to have been made, is not produced, or indicat by Number or Rubrick ; nor does the Defender know any Act of the Tenor and Title Libelled : and the Defender in humility conceives that it is not consistent with the Act Libelled on in the proposition of the Dittay, discharging persons to impugn the authority of the Estates of Parliament, to term the Members thereof, especially in making of an Act (which being carried by plurality of voices, is the deed of the whole, and specially such an Act as is meant in the Libell, where there were none, or very few of a contrair judgment) a factious Party.

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3. The case of the first Member of the said 8th Article anent the pretended Act of Parliament as is Libelled, for abandoning and leaving his Majesty to the disposal and mercy of his enemies : The Sectarian Army does debord fra the Acts of Parliament, as clearly appears, and can be subsumed on under none of the Acts of Parliament Libelled. For if the 10 Act Parl. 1647. be understood and meant as the Act Libelled, that being an Act of Parliament, the Defender humbly alledges, that an Act of an acknowledged lawful Parliament should be made a Crime for accession, whereunto a Member of Parliament shall be indyted, especially for so high a Crime as Treason, is without ground of Law or Practique, and is hoped the honourable Parliament will no ways sustain it, and therefore that he needs say no more in confirmation hereof. Likeas 4. All that is in that Act, and substance thereof, being the Estates of Parliament their declaring their concurrence for his Majesties going to *Hombie* House, or some other of his Houses in or about *London*, and that expressly to satisfie the desire both of his Majesty himself, and of his two Houses of the Parliament of *England*, and there to remain (not under the power of Sectaries) but with such attendance about him as both Houses of Parliament should think fit to appoint; with respect also had to the safety and preservation of his Royal Person: And the Estates therein do also declare against all harm, prejudice, violence or injury to be done to the same (as indeed it was horrid to think that any on earth should have done) or prejudice to his Majesties Posterity. But thereafter it is clear fra the 4 and 7 Acts of Parliament, 1648. That the Sectarian Army disobeyed, and threatned the Houses of Parliament, imprisoned and banished faithful Members, and by a sudden surprising, violently seized upon the Person of the Kings Majesty, carried him fra his House at *Hombie* against his own will, and declared resolutions of both Kingdoms, and kepted him under their Guards, till at length by their power and prevalency, he was committed and kepted closs Prisoner at the *Isle of Wight*. This being the true case out of the expresse words of the Acts before cited. As to that Declaration, Act 10. Parl. 1647. The Defender alledges, 1. The Act bears expressly, that it was to satisfie his Majesties own desire: 2. That it is homologat and approven by the Parliament 1648. in so far as by the fourth Act, intituled, Anent their resolutions concerning the breaches of Covenant, and Treaties betwixt the Kingdom of *Scotland* and *England*, and demands for reparation thereof, finds the violent seizing on his Sacred Person, and taking him away from *Hombie* House, as appears by Act 7. by that Army against the resolutions of both Kingdoms, a Breach, and amongst the Reparations, they desire expressly that conform to the former desires of this Kingdom, the Kings Majesty may come with Honour, Freedom, and Safetie, to some of his Houses in or near *London*, that the Parliaments of both Kingdoms may make Applications to him, and in their Act 7. intituled a Declaration of the Parliament of *Scotland*, to all his Majesties good Subjects of this Kingdom, concerning their resolutions for Religion, King and Kingdom, &c. after they declare that violent seizing on His Majesties Person, and carrying him away, &c. by that Army against the Resolutions of both Kingdoms, to be a breach. And they declare they intend to send to both Houses of the Parliament of *England* the desires following, which they call necessar and just desires, for Religion, his Majesties good, and peace of these Kingdoms whereof this is one; that conform to the former desires of this Kingdom the Kings Majestie may come with freedom, honour, and safety to some of

his Houses in or near *London*: and declares that thereafter they will endeavour it. And Act 8. in their desires to both Houses of the Parliament of *England* the same desire is repeated conform to the former desires of this Kingdom. By all which it is clear that the seizing upon His Sacred Majesties Person, was the violent Deed of that wicked Army, done by a violent surprisal against the declared Resolutions of both Kingdoms; and that his Majesties coming to some of his Houses in or about *London*, where both Kingdoms might make application to him, conform to this Kingdoms desire (which is that wherein the Estates declares their concurrence with his Majesty, and of both Houses of the Parliament of *Englands* desire in the said Act 10.) is approved as a just and necessar desire for his Majestie, and accordingly enacted among that Parliament 1648, their desires to the saide Houses, and declared, it should be endeavoured; if refused, so highly is it approved by the said Parliament.

In respect whereof, specially of the standing Acts of Parliament 1648, the Defender humbly craves, that albeit this Article were relevantlie, distinctlie and clearlie lybelled, and subsumed on some of the Acts of Parliament in the proposition condescended on (as he humbly conceives it is not) yet he ought to be assoylized therefrae.

And for further clearing what was the ground and occasion of that Act, and the reasons inducing the Defender and the Parliament at that time to go along therein, and how little ground there is for challenging him thereon; it would be considered, that when the late King came to the Armie before *Newark*, the Defender was in *Ireland* by Commission from the Parliament 1646, and that his Majesties Declarations anent the grounds of his resolution in coming to the Scots Armie, was sent both to the Committee of Estates in *Scotland*, and to the Parliament of *England*; so that the same being printed before the Defender came to *Newcastle*: he neither did nor could know any other ground of his coming, nor what was contained in his Declaration, viz. His gracious Resolutions to comply with his Parliaments in both Nations, and these intrusted by them in every thing for settling of Truth and Peace, and that he would totalie commit himself to their Counsels and Advices; upon which Terms both the Committee of *Scotland*, and Officers of the Armie, declared to his Majestie and to the Parliament of *England*, that they received him; and all this before the Defender came from *Ireland* to *Newcastle*: from whence his Majestie and Committee at *Newcastle*, sent him with Instruction to the Commissioners at *London* (of which Commissioners the Defender was one also) to hasten the propositions, and his Majestie privately commanded the Defender to take the advice of the Duke of *Richmond* and Marquels of *Hereford*, anent what might concern his Majesty, and particularly if it was fit that the Scots Armie should declare for his Majesty, whose Judgment and opinion was, (which they conjured him to tell to his Majesty) That such a course was the only way at present inevitably to ruine his Majesty, for that he himself knew, that neither the Nobility nor Gentry of *England* who attended him at *Oxford*, wished him to prevail over his Parliament by the Sword, and much less would they endure the Scots Army to do it; and that it would make all *England* as one man against him, and that it was their earnest request to his Majesty, by any means to give way to the propositions; which advice he not only faithfully told to his Majesty at *Newcastle*, and many others there, & to our Gracious Sovereign who now is, when he was
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in *Scotland*, but also being in the Tower, he intreated the Lieutenant thereof to propole for him, that the Marquess of *Hereford* who was then alive might be examined in this matter, which was put off from time to time, because of his Majesties greater Affairs: and as it is most certain, hat as neither Independent nor Seclarie was able to carry one Vote in the Houle at that time; so it is nottous that they who tendered his Majesty most in *England*, were most for Disbanding the *Scots Army* and his Majesties staying in *England*, wherein the Defender appeals to the particular knowledge of the rest of the Commissioners then there; and it is of truth which all knows, that so little fear, suspicion, and Jealousie there was of what followed, that the great fear of his Majesties Friends in both Kingdoms was, that if he fixed on his Subjects in *Scotland* all *England* would be against him, and probably cast off his Government and Interest forever. So that under what Representation soever, the matter may now appear, because of the sad Sequels; yet to them who knows the matter as it was then stated, what Declarations and Assurances there were from the Parliament of *England*, and how little fear of the prevalencie of Seclaries: It did appear to be a Deed if not of necessity, at least an Act very expedient and convenient for the time, otherwise many who did assent thereto would never have condescended; and consequently the Defenders concurring therein upon such probable grounds, can be no such Crime as is lybelled; nor is it relevant to infer the conclusion of the Dittay.

To the second Member of this Article, bearing that under pretext of satisfaction for the Arrears of the Armie he went to *London*, and there Treasonably gave up, at least condescended to the upgiving of his dread Sovereign and Master, as being impowered so to do by the Kingdom of *Scotland*.

It is answered First, This Member is not relevant: because neither the time of his going to *London*, nor of his being there, the persons to whom he condescended to give up are not particularly mentioned and set down, by which generality he is precluded from several Defences which might arise to him, if the Dittay were clear: and it is a principle in common Law, and of constant practise, that *non est vagandum in crimine sed debet certum & peciatum dici*, for that *dolus & error versantur in generalibus*. 2. Noways acknowledging the relevancie of this subsumption herein, upon any of the Acts of the proposition, until the samen be clearly condescended on, and craving the samen may be first done, opposes the Act of Parliament; and the truth is, while the Defender was at *London*, there was nothing spoken at all by him of leaving his Majestie in *England*, except what he was expresly commanded by his Majesty to speak to Duke *Richmond* and Marquess of *Hereford*, as is aforesaid.

To the third Member of the Eight Article, bearing that in a joynt Committee of both Kingdoms, where the *English* questioned whether the *Scots Army* would concurr with them in their said Treason and Treacherie; The Defender after many Arguments used in their Favour, earnestly requested them to have Patience for a little time, and that it would appear how far they intended to concurr; And that within few days thereafter, there was a Declaration and Vindication emitted in Name of the said Army, holding forth, that in case his Majesty did not Condescend to all the Desires of both Kingdoms, which were no less than divesting himself of all regal Power, Civil, Ecclesiastick, and Military; They would Deliver him up, which immediately

ly upon the Receipt of 200000 *Lib.* the Defender and they did.

It is Answered, that adhering to the former Defences anent the Subsumption, and repeating them here : This Member, although it were rightly subsumed (as it is not) is most irrelevant, and general in time, place, Person and Speeches, mention being made of many Arguments and never one adduced, and of an Question and Answer out of which even as libelled, Treason cannot be inferred, *viz.* that the Defender requested them to have Patience a while, and it would appear how far the Army intended to concur ; But within a few days thereafter, the Army declared themselves in manner as aforesaid ; Seing these alleadged Words of the Defender as they are indefinite and general, so the most they could infer is, that in a short time it would appear whether the Army would concur or not, and what can from thence be inferred as to any thing the Army did, if they have outshot their Duty, and it was in regard of him at the speaking of these Words, a future contingent wherein the Defender had no Causality, so they must answer for themselves, and not the Defender ; and for ought he knows, there was never any such Declaration emitted, neither should there be any captious use made of Words, if there had been any such Words spoken, as there was never, especially to infer High Treason, for that *lubricum lingua* is oftner a Frailty than a Fault, and that by all Doctors of both Laws, it is constantly held that *verba debent intelligi ne sonent in delictum*, and that *in dubiis*, they should be Interpret *a proferente*. And therefore noways acknowledging the Words and Deeds libelled. The Defender ought to be Assailzied from this Member. And as to the Circumstance libelled, that the Delivery of his Majesty, was immediately after the payment of the 200000 *Pound*, it is clear that there was no respect to that Money, in what was done therein by *Act* 7. *Parl.* 1648, wherein the Estates then declare that Money was never the cause or motive of any of our Undertakings and Resolutions, whatever Enemies had falsely suggested of that kind. And lastly, adhering to his former Defences oppones to this haill *Article* : The Treaty at *Breda*, and the *Acts* of *Parliament* of Oblivion and Ratification *ut supra*.

Article 9. As to the ninth *Article*, and whole first Member thereof, bearing that the Defender opposed the Proceedings of *Parliament* 1648, by Arguing, Voting, and after the Resolutions of *Parliament* were past in an *Act* by protesting against the samen.

It is alleadged for the Defender ; 1. It is not condescended under which of the *Acts* of *Parliament* libelled on in the Proposition, this *Article* is subsumed, and therefore the Libel as to that part of the *Article* for Arguing, Voting, and protesting, is inept, and the Defender has just reason in such an incertitude to deny that it can be relevantly subsumed on any of the saids *Acts* of *Parliament*. 2. Arguing and Voting is noways relevant to infer the Conclusion of the *Dittay* ; because by Divine Law, Law of Nature, Nations and Statutes, and Practiques of this Kingdom *in deliberando*, a Member of *Parliament*, or other Council should give Advice and Suffrage according to his perswasion of the good or evil of the Subject debated on, and under Consideration, wherein if reason can not bring him up, nor his Conscience admit him the length of others in such publick Councils, he ought to have Charity for the one, and Excuse for the other : Likeas by the 5th *Act*, *Parl.* 2. *K. Ch.* 1. It is expressly Statute, that every Member of *Parliament* shall faithfully and

and freely speak, answer, and express themselves upon all, and every thing which is proponed, in as far as they think in their Conscience may conduce to the Glory of GOD, the peace of the Church and State, and imploy their best Endeavours to promote the same under which Oath read in audience of the late King, and by him approven in the Parliament 1641, the Defender as a Peer of the Parliament in *anno* 1648, was solemnly tyed to the Dictates of his Reason, and Prescript of his Conscience, and can not be called in Question as a Member having freedom therein, and conform thereto, is the Oath of this present Parliament, bearing that every Member shall faithfully and freely according to their best Judgement, give their Advice and Vote in Parliament.

To the second Part of the first Member of the said *Article* anent the Defender, his protesting and dissenting from the said Act 1648.

It is alladged for the Defender, the Protestation not produced as it ought to be, whereby it will appear that if any was, the same was before the Act of Parliament past, and that they did only protest, and enter their Dissent against proceeding to the determination of the Question then in hand, which evinces the same to have been before the Act was made; Likewise, if need be, the Defender offers him to prove by the Members of Parliament then present, that being asked if they would renew their Protestation after the Act, they shunned to do the same, the Act being now past.

2. Absolvitor, though the same were produced, because it is offered to be proven that the same was Ratified in the 4th Act, Parl. 2. Sess. 2. Ch. 2. which was approved at the Treaty at *Breda*, and Confirmed at *St. John's Town* and *Stirling* as said i.; But for the Honourable Parliament their more full clearing anent the Defender's carriage in the said Particular; It is offered to be Proven, if need be, that the Defender before the Commissioners return from the said Isle of *Wight*, the said year when he heard that his Majesty had satisfied his Peoples desires concerning Religion, in presence of divers Persons of Honour, he expressed himself Passionately earnest to engage for his Majesty's Freedom; Likewise, the only difference of the Opinion anent the Engagement was in the manner the Grounds of these that were dissatisfied being as they are expressed in the said Protestation, viz, that the Parliament should not proceed till the Commission of the Church were consulted, and adding also, which is not therein expressed till Advertisement, and three Months warning were given, conform to the large Treaty, untill all means of Peace had been first essayed, and while first the lawfulness and necessity of that War should be found by the Parliament, conform to the 7th Act thereof. And it is humbly conceived, many in this present Parliament do remember, how unanimous all were that his Majesty should be brought out of the hands of the Sectaries to some of his Houses in or about *London*; and all they differed in was that the Church should be consulted anent the security of Religion, all means of peace should have been first essayed, and warning given in manner foresaid, conform to the large Treaty, the breach whereof was made one of the grounds of that Declaration Act 7th; and it cannot be refused but at several meetings, the Dissenters debated the dangerousness of that War, specially if the Army should be defate from the sad consequences which might thereupon ensue, to King, Kingdoms, and Religion, as immediately thereafter fell out: whereas had the Nation been intire and whole in their power and force, that Army of

Sectaries in probability would not have darred to have attempted these matters, which afterward they did. so that the case being truly stated, there will appear no malice against his Majesties Person, Authority, or restitution thereof, but an uncleareness to enter in an War of such danger and hazard, and the respect they had to the sincerity of Religion, (as all then profest) according to the Covenant.

To the second member of the 9th Article, whereby it is alledged, that in contempt of the Authority of that Parliament, and against the preservation of his Majesties person and Authority, That the Defender Convocated an Army of Rebellious Subjects, and therewith committed divers and sundrie outrageous Slaughters and Vastations upon the persons and estates of his Majesties Subjects, Invaded Cities and Castles, seized upon Magazines, Arms and Ammunition, and called in an Army of Sectaries to his assistance.

It is Answered 1. That the s^men is not relevantlie subsumed upon any Act of the proposition, at least till the Advocat condescend upon which Acts thereof the s^men is founded; the Defender is not bound to make answer. 2. The Defender denies that he did Convocat these Forces, or gave Counsel or Command therefore, and as to his being with them he must be absolvied. 1. Because by a Treaty at *Stirling* betwixt the chief Officers of the Army then alive and out of prison, and a *Quorum* of Members of the Committee by authority of Parliament 1648, who had power to order the incident Affairs of the Nation; the said Meeting and all Acts of Hostility and others thereby committed are expressly discharged *hinc inde*, and an mutual Oblivion and Indemnitie therefore. 3. Any Meeting he had with them was by a Call of those of the Committee of Estates who joyned with these Forces, and who in the Treaty is acknowledged the Committee of Estates. 4. The said Meetings and doings thereof, together with the Treaty and Articles thereof, is ratified and approved by the 3d Act, 2 Parl. 2. Sess. Ch. 2.

To the third Member of the 9th Article, bearing, that apprehending his power was not able to withstand his Majesties good Subjects, the Defender called in to his assistance the Army of Sectaries, and that he went to *Mordingtoun* and met with the Commander of that Army, had privat Consultations with him, and prevailed with him to come to *Edinburgh* with his Armie; whose coming he might have hindred, because *Oliver* said, he could not help his lying upon the Tennents of *Mordingtoun*, for that his staying and going depended upon the Defender; and that he did countenance and Consult with the Sectaries and their Commanders in *Edinburgh* or in the *Cannongate*, in the house called the *Lady Homes* Lodging.

It is answered, 1. That as to Speeches and Consultations in general *non relevat*, except they were condescended on; and as to the words spoke by *Cromwel*, if spoke by him, it is a Lye, and can inerr nothing against the Defender; and the occasion of his stay was till he got *Berwick* and *Cairlyle*, which could not be restored till the Treaty at *Stirling* was closed: and as to his meetings and treating with him *absolvitor*, because he and others did the same by warrand of the Committee, and which Treaty was ratified in the foresaid Act of Parliament thereafter.

To the 4th Member, That he consulted and voted to the drawing up of a Letter directed to *Cromwel*, wherein he and his Complices ingadged themselves in name of the Kingdom of Scotland, to do their outmost Endeavours, that none who had been accessorie to the Ingadgment, or in Arms at *Stirling* in

in pursuance thereof, should be employed in any place of Trust, without the advice and consent of the Parliament.

It is answered, 1. No such Letter produced. 2. Though it were produced, yet Consenting and Voting *non relevat*, because a Vote in the Committee of Estates, can infer no Crime against the Defender, or any Member thereof, nor any Act past in the said Committee, especially seeing, 3. The Acts of the said Committee were ratified in the fourth Act of the Parliament foresaid, all ratified thereafter by the Treaty at *Breda*, and Acts of Ratification at *Perth* and *Stirling*; and the necessity thereof would be also considered, in respect by the large Treatie both Kingdoms having given their publick Faith, that the breakers thereof should be rendred up to the Observers; and that the *English* Army then upon the Borders required the performance thereof against the Insurgers, and attour for further security Pledges and places of strength, was at that time counted a great favour; (considering their power to have made their own Term) that they did accept this Act when they might have imposed and forced to what they pleased more.

To the fifth Member of this Article, bearing, that he did draw up, at least did counsel the drawing of certain instructions given to Sir *John Cheissie*, reporting that the Noblemen and Gentlemen of quality, and considerable Officers who went in to *England* under *Duke Hamilton*, and were there Prisoners, should be kept as pledges for the peace of the Kingdom. It is answered 1. Not produced, as it ought to be, that it may thereby appear whether he Subscribed the samen or not. 2. *Non relevat*, one of the Committee, except it were Libelled present, and voted at that time for *noxa caput sequitur*. 3. *Non relevat* voted, *quia in Senatu, nemo tenetur de Consilio*. 4. Opponis the authority of the Committee, Treaty, Acts of Parliament, and Ratifications foresaids.

To the last Member of this Article, bearing, that he gave warrand under his hand for issuing a Proclamation against the Families of the Lord *Rae* and others.

It is alledged for the Defender 1. No such warrand produced. 2. If any such warrand were produced under the Defenders hand, it would certainly appear to be as President of some Committee, and so not his personal deed, nor such a deed as can infer any crime against him. 3. No such Proclamation issued. 4. Although issued, yet that took no effect, and so was *mine tantum & animus ad effectum non productus*. 5. Opponis the Act of the said Committee and Act of Parliament 1649. foresaid, which Parliament, and hail Acts thereof is Ratified in the Treaty at *Breda*, and approven in the Parliaments at *St. Johnston* and *Stirling*, wherein was also made an Act of Oblivion oftentimes before alledged on; in respect whereof the Defender ought to be assoilzied from the said 9th Article, and hail Members thereof, and all therein contained. And because the Defender has in his defences to this Article so oft alledged the Acts of Parliament 1649 for his vindication, he desires that it may be observed, which is very observable, that by a Printed Treaty at *Edinburgh* and *Stirling* in September 1648. It is agreed and appointed by these of the Committee of *Stirling* 1648. That a Parliament should sit down before the 10 of *January* next, conform whereunto they did convene and sit down upon the 4th of the said Month of *January*, as by the said Treaty, and the first and third Acts of the Parliament does appear, whereby it is clear that the said Parliament 1649. was appointed to sit by the Committee of the Parliament

1648. Who had power by the last Act of the said Parliament to convene the Parliament before the first *Thursday* of *March* 1650. if they thought fit: As also, that Session of the Parliament 1649. by the last Act thereof, continues the same to the first *Thursday* of *March* 1650. at which day they convened in their next Session, and therein Ratified the Acts of Parliament made in the former Session; and whilk day was the dyet to whilk the Parliament 1648. continued the same, with power to the Committee of Estates to convene the samen sooner, if they thought fit, as said is: Whence it is evident that the said Parliament 1649. whether as appointed by the uncontroverted Committee 1648. at *Stirling*, in their first Session, or as is continued till the first *Thursday* of *March* 1650. in their 2d Session, both conform to the last Act of the Parliament 1648. must subsist; and sua the said Defender has just reason to found his defences upon the Acts thereof. It is also further observable as to the loyalty of that Parliament, that therein the murther of his late Majesty was declared against, his present Majesty proclaimed and brought home, his Subjects of this Nation reconciled to him, and taken in favour, an Army appointed to oppose his enemies, the Crown set upon his Head, and that Session at *Perth*, wherein the haill preceeding proceedings were approven, were dignified by the presence of His Royal Person:

Article 10. As to the tenth Article, and that part thereof where it is Libelled, that the Defender in *anno* 1649. not desiring to oppose in publick, or in a direct way his Majesties home-coming, he procured the application made to be clogged with such limitations and restrictions, as were most derogatory to Monarchical Government, as is alledged to be more fully exprest in the Commission, Instructions, and Addresses which are repeated as a part of the Libel.

It is alledged for the Defender, First, seing the said Commission, Instruction and Addresses are Libelled on, and repeated as a part of the Dittay, in all Law and Form of Process, they ought to be produced with the Libel, for the Reason adduced in the Defence against the relevancy of the proposition of the Dittay; and till which be produced it cannot be constant what the saids limitations and restrictions are, and how far they are derogatory to Monarchical Government; and therefore till then there can be no Process. 2. It is not contended nor cleared upon which of the Acts Libelled on in the proposition this Article and Members thereof are subsumed, and therefore it is obscure and inept; and that incertitude the Defender has just reason to deny, that it cannot be subsumed on any of the saids Acts, to infer the pain and crime Libelled against the Defender, none of the saids Statutes making any mention of Treating, or inferring any pain therefore. Like as after Ruptures and differences betwixt a King and his Subjects, all Lawyers and Politicians do agree, that the best and safest way of removing the samen, is by Treaty, and being concluded on, it is also their opinions that the samen are to be observed, at least so far as to exeem the Subjects from punishment, to whom immunity has been thereby promised. And in this *Grotius de Jure Belli & Pacis*, lib. 3. cap. 19. is most clear, and many others who Write on that Subject; and therefore the said Treaty being concluded, and after ratified by his Majesty in his Parliament, the Defender cannot be called in question for his accession thereto, nor the pain of Treason thereupon inferred: For the said Treaty, and conditions thereof being accepted and agreed to by his Majesty,

jeſty, his Majeſties voluntary Contract cannot be Libelled as a Crime, far leſs ſo high a Crime as Treafon againſt the Defender: 3. *Absolutor* fra that Member of the ſaid Article, becauſe not only after the ſaid Treaty did his Majeſty tacitly remit any Crime, if any was in the ſaid Treaty, by admitting the Defender to places of truſt, by receiving the Crown from his hand at the Coronation, and by admitting him to take the Oath of Alledgance, and to be a Member of his Majeſties Privy Council, but alſo after the ſaid Treaty was Ratified, there was an Act of pardon and oblivion by his Majeſty and his Eſtates of Parliament, oft times before alledged, and is here repeated.

Though the above-written defences be relevant in Law, as to the ſaid Member, yet for the Defenders farther vindication, the honourable Parliament would take notice of all along the preceeding Articles, all the publick actings fra the year of God 1640. to the year 1648. Wherein the generality and representatives both Civil and Eccleſiaſtick in the Kingdom concurred, and charged upon the Defender as his particular actings: Or as if the Defender had been ſpecial Author: Whereas in this Article anent the treating with, and home bringing of his Majeſty, wherein it is known, the Defender according to his bound duty, was moſt active and zealous; and wherein he wreſtled with all his might, and by his pains, and Gods bleſſing thereon, overcame many difficulties, and did effectuat the ſame. The Libell does ſo far detract from the Defenders faithful diſcharge of his duty in this ſo glorious action; and without Libelling the leaſt preſumption of any circumſtance to make the ſame probable. The Defender is accused, as if he had in his judgment been againſt his Majeſties home-coming, which becauſe he durſt not avow publickly, therefore he betook himſelf to under hand dealing, to clogg the Treaty with limitations and reſtrictions, excluding the Defender fra all acceſſion to the ſaid duty, in ſua far as it was good, *viz.* to bring home the King, and making him the ſole Author of all Libelled to be evil therein, to wit, of the limitations and reſtrictions, whereas the truth is he was active in the Kings home-bringing, and was paſſive in the other, having laboured what he could that there ſhould be alſo few conditions, and the ſame alſo ſatisfactory to his Majeſty as was poſſible at that time to obtain, which is known to all that did tranſact in the ſaid Affair, and which if need be it is offered to be proven, and for farther clearing hereof, if this Article ſhal be farther inſiſted on, my Lord Advocat will be pleaſed to condeſcend, who the parties were that made the Motion for Addreſſes to his Majeſty, of whom the Defender ſhould have been afraid if he had been in a contrair Judgement to have oppoſed openly, for if the Defender had ſo great ſway in Affairs as all Actings in the preceeding Articles he is alledged to have had, and alſo if he had intended as is (broadly and with full Mouth) in the ſaid Lybel all along alledged to have extirpat and eradicat the Kings Majeſties Authority, Government and Poſterity, and had ſuch Correſpondence with theſe abominable Regicides, as all are perſuaded by the ſaid Libel to believe, in the ſaid year of GOD 1649, when the ſaid Traitors were ſtrong, and this Land through Diviſions and otherways very low, and when the power was in the Defenders, and in his Complices their hands (as my Lord Advocat is pleaſed to lybel and term them) who at that time had the Managing of Affairs, then was the firſteſt time and beſt opportunity, if they had any ſuch diſloyal thoughts to have ſhaken off that Government; But ſo fat did they abhor any ſuch Treachery, that they not only proclaimed his Majeſty, and according

ding to their duty owned his interest. even with the hazard of their Lives and Fortunes, there being none so shallow but easily might have seen. that the discharge of their said duty would bring upon themselves and the Nation the power of *England* (the only power of Arms and Armies being at that time in the abominable Regicides their hands) who did immediatly thereafter invade this Kingdom.

As to the other member of the said 10 Article, whereby it is lybelled that the Defender to obstruct his Majesties purpose yea so far as in him lay to terrifie him therefrae by his and his Complices cruelty execute upon the Marquis of *Montross*, who as his Majesties Commissioner did represent his person, cause Murder the said Marquis in *anno* 1650, in manner at more length lybelled.

It is answered 1. It is no way relevantly lybelled that the Defender in general caused murder him except it were condescended *quo modo* he caused, and if thereby it be meant his voting in Parliament 1649 in the said matter, *non relevat*, because a Vote, Act or Sentence of Parliament is no ways relevant to infer a Crime against any particular Member therein, as hath been oft before alledged. Likeas 2. The Sentence of the Forefaulture of the Life and Estate of the said Marquis was no Decree of the Parliament 1649, but of the Parliament 1645, which was homologat by several other Acts of Parliament, excepting the said Marquis amongst other excepted persons, as specially by two Acts in *anno* 1645 mentioned in the Index of the unprinted Acts that year, and by the Act 14 Par. 3. in *August* 1645, and by the Act 21 of the said 3 Par. *Seff.* 6, and by the 21 Act of the Parliament 1648. And yet 3ly the Defender did not vote in the Business of *Montross*, as he can prove if need beis by the Members then present 1649. And as to the Aggravation of the said Murder, the said Marquis being his Majesties Commissioner for the time, it is no ways a relevant Circumstance to aggravat the same, except it had been lybelled that the said Commission had been shown to the Parliament, whilk no body can affirm ; But on the contrair, the said Parliament they conceived they had just reason to presume that there could be no such Commission for his coming against him at that time ; Because, His Majesty after the Murder of his Royal Father, had very graciously admitted their continual Applications to him ; Likeas before *Montross* his coming at the time to *Scotland*, and alwise thereafter, His Majesty had written to the Committee of the said Parliament, under the Name and Title of the Committee of Estates of his Majesties Kingdom of *Scotland*.

As to the Defender his alledged keeping correspondence with *Cromwell* in the year of GOD 1650, as the same is irrelevantly Lybelled, nor Deeds or Acts of Correspondence being condescended on, so there was never any such thing ; And there was one *Hamilton* who vented this untruth hanged at *Stirling*, and at his death did declare that the same was an most unjust Calumpnie, and it is not to be believed that at that time he would have charged his Soul with a Lie, and in Law the words of a dying man are to be believed.

As to the Act of the West-kirk, the Defender (no ways acknowledging the relevancie of the said Article as it is lybelled) was so free from having the least Accession, to the said Act or Declaration, but so soon as he got knowledge thereof, to evidence his Fidelity to his Majesty, it is offered to be proven by Witnesses (for their Loyalty above all Exception) that when the first News came that the Commission was about the drawing of the said Act, the Defender gave advice to his Majesty to draw a fair Declaration, and to go such length as in freedom he could, that thereby he might preveen the said

And obviate the pressing thereof, but as for the other which was pressed, he was altogether against the same, and dealt with the Ministers who came from the Commission of the Kirk to forbear pressing his Majesty therewith, which also if need were might be proven.

Article 11. As to the eleventh Article and subsequent Articles, because the same are for deeds of Compliance after the Usurpers had prevailed and were in possession, Before the Defender make particular Answers, it is necessary to premise in general, that it being notourly known to the World to the eternal honour of this Kingdom, as for that damnable Usurpation of *Olivers*, not only we were not active in the establishing the same, but according to our bound allegiance to our Sovereign, were to the utmost possibility of our power in Arms under his Majesty and otherwise active against him, and in opposition thereto many lost their Estates, many their Lives and all of us our Liberties, and when we could do no more being oppressed by the force of the said Usurper, as a chaste forced Virgin, we cryed to GOD and Man, attesting Heaven and Earth against Usurpers, even when their bloody Swords were at our Throats, he and his Army, amongst many other execrable mischiefs, were also guilty of this Usurpation, we have suffered and have been only passive under their irresistible Force, and as this was the condition of the Kingdom, so specially of the Defender, as he had been most active and instrumental in his Majesties home bringing, which was the only ground of their quarrel, and for which he was looked upon by them as one of their capital Enemies; So even after it pleased GOD for our exercise and punishment to suffer their power to prevail over all his Majesties Forces, and over this Kingdom, such aversion had the Defender, even so much as to live under their power let be to comply actively with them, that after *Worcester* the Defender offered to Mr. *David Dick*, if he could get his Company or the Company of other honest Ministers, that he would never capitulat with any English man, so long as he could subsist in any part of *Scotland*, either Highlands or Isles; Whereupon it is humbly craved that Mr. *David Dick* may be examined, neither did the Defender ever capitulat with them till August 1652. having before that endeavoured all that in him lay to have perswaded those of *Athol*, *Monteith* and others his Neighbours in the Highlands to have concurred with him, that they might have joyntly made some probable Force for resisting the overspreading power of the Usurpers, but all in vain; Like as long before that time the haill Forts and Strengths of the Kingdom were surrendered, yea and the whole Kingdom by their Deputies and Representatives (who met at *Dalkeith* with the Commissioners of the Parliament of *England* so called) was forced to submit to their power and accept the tender of the Union of this Nation with *England* profered by them, Neither did he at the said time in August 1652, voluntarily come in, and capitulat with the said English, but was surprized, several Regiments of the Forces, Horse and Foot, having suddenly come about his House, where he was for the time lying deadly sick, as can be testified by Doctor *Cunninghame*, who was with him for the time, and it humbly craved to be examined thereon, as also notwithstanding of the said Surprizel, and the Defender's sad condition, though they threatened, notwithstanding of his Sickness, to carry him away Prisoner, yet all their threatening could not prevail with him; But he did absolutely refuse to subscribe the Articles first offered, which contained the

the tender of the Union, and an Obligation upon his part to promote the same, and their Government as then Established; But to live peaceable, yea, such Jealousie had they of the Defender, that by his Capitulation he was Prisoner upon demand; neither during all the time of their Power over this Kingdom, had he ever any favour of the said *English*, but was always looked upon by them with a most jealous Eye: And for Evidencing hereof, the Defender humbly craves, that there be Commission granted for examining Lieutenant Colonel *Wister* anent what was deponed by *Macnabhan*, and several others of the Defenders small affection to the *English*, or any other Authority but the King's. Likeas, it is nottour how unjustly he was Persecute before the Exchequer here for the time, for payment of 4000 *lib. sterling*, alleadged to be restand of bygone Feu-duties. This being the Defenders true case; It is hoped that the Honourable High Court of Parliament will take to consideration how the Defender stood out as long as he could, till he was Prisoner, and will have a different consideration of Subjects actions under the lawful Magistrat in exercise of his Authority by himself, or others lawfully constitute by him, and of their Actions under Cruel Usurpation and Tyranny, the lawful Magistrat being forced for his own Safety, to abandon his Dominions and People, to the Lust and Oppression of the unjust Usurpers, who were Masters, not only of their Fortunes and Persons, but their Lives and all that was dear to them, and had for a long time detained the Possession of his unjust Usurpation, and debarred the lawful Magistrat, which case is not only differenced by all who write on that Subject, and in all History; But also *Cook* in the third part of the *Instituts* of the Laws of *England* Cap. 1. anent high Treason, in expounding the Statute the 25. *Edward* the 3. upon the Words of the Statut *Le Roy*, puts such Weight upon the King's being in Possession, or out of the same, that he expressly affirms, the Statut is to be understood of a King Regnant and in Possession of the Crown and Kingdom. As also, that in such cases a favourable Consideration is to be had of the actions of a Subject, who was particularly noticed, and jealously lookt upon by the Usurper for his affection to the lawful Magistrat and his Government; All which being remitted to the Commissioner his Grace, and the honourable Parliament their Consideration, The Defender now comes to Answer to the 11th Article.

Against which 11th Article, and all the Members thereof, as libelled; It is alleadged, the said Article is general, not condescending on the Day nor Moneth, nor on the particular Year of GOD, of the Committing of the Deed therein libelled; But only alternatively in *anno* 1653, or 1654, and therefore as has been oft before alleadged the same is inept, and there can be no Process thereon. 2. It is not Condescended nor cleared on which of the *Acts* of Parliament libelled on in the Proposition this Article, and several Members thereof are subsumed, and therefore it is obscure and general, and in that Incertitude the Defender has reason to deny that it can be subsumed on any of the saids *Acts* to infer the said Crime and Pain.

As to that which is first libelled in this Article, that the Defender did not Rise in Armes with the Commissioner his Grace, and the Earl of *Glencairn* who were Commissionat by his Majesty; The Defender repeats the two Exceptions aforesaid against the whole Article, being confident this cannot be subsumed upon none of the *Acts* libelled on, and farther alleadges that it is not relevantly libelled to infer *vel minimum culpam* against the Defender, far less so high a Crime except it were libelled that their Lordships Commission had been

been shewed him, and he required, whilk was never done; and herein he may refer himself to the Commissioner his Graces Declaration, and if his Grace does not remember that the Defender sent him word, shewing his desire to have met with his Grace, and to have spoke with him about that Business, but had never the Honour to have his Graces answer or appointment. 2. For farther clearing that his not Joyning, except he had been required is no Crime; It is evident from the 4th Act of the 1st Parl. Ja. 1. that these only are Punishable who does not assist the King's Host being required thereto; and Craig page 365. says, that because the King has so many Vassals, they are not obliged, nor cannot be punished, except the particular Pain to be inflicted upon the Away-stayers be particularly express in the Edit by which they are Commanded to appear; and page 365. he says, that these who come not, being Warned by an Edit, shall be counted Traitors; and page 370. he says, that the Vassal should not be obliged to appear at any such Service, except they should be desired, which Command should be proven by his Peers, these Edicts were particularly required by the feudal Law, and were called *Herebonna*, which is defined by *Cujas* to be the Calling and Citation of the Army, and is *Lib. 3. Cap. decimo, 4to. leg. Francie*, to be the Punishment of him who comes not to the King's Host when he is called: And this Assertion is clearly proven from *Rague* in his Treaty *de jure reg.* page 53. Likewise, by the said Act, Parliament 1. Ja. 1. It is expressly Ordained that these who disobey to Inforce the King against nottour Rebels against his Person shall be Challenged; First, If they be required by the King as said is. 2. And except they have for them reasonable excuses. But sua it is, the Defender not only was never required as has been alleadged, but there was even very pregnant Reasons as he humbly conceives, the which it seemed very probable at that time, that albeit it be the duty of all his Majesties Subjects, to rise for his Majesties Interest against Usurpers; yet it was not seasonable as Affairs then stood, till either they had been Defeat by Sea in their Inengagement that they then had with *Holland*, whereby both their Forces might have been diverted, and the transportation of Victual and Ammunition from *England*, *Ireland*, and the Parts of *Scotland* under their Command, and their Army in *Scotland* might have been intercluded; Or that *Spain* and *France* had concluded that Peace, whereof there were then several reports; and whereupon his Majesties Subjects in *Scotland* might have had hope of some probable Assistance in their Undertakings in his Majesties Service; Or that Division, and in consequence, Confusion had fallen out in the *English* Army among themselves, whereof there seemed to be little hope, so long as the appearance of any for his Majesty should unite them as against a Common Enemy, as it was like it would, though it should have no other Effect, and as in effect the Event proved, that that Army never divided till they had no Common Enemy against whom mutual Preservation does necessitat a mutual Concourse, but allanerly an with another. And albeit a particular Command had not been absolutely necessary if his Majesty had there been in Person, yet in a juncture of time wherein such as was improbable for many stait Reasons, which induced the Defender to believe that there was no Commission granted at that time, which presumptions *excusant a dolo*, and without *dolo* as has been said formerly there can be no Crime. And further, though he had been required, yet could not have been Punished for his not obeying, seeing in effect he was the Enemies Prisoner upon demand.

Lastly, The *Acts of Parliament* libell'd, whereupon the said Deed of not joyning with these who were for his Majesty the time libell'd, are subsum'd as falling under the same, can be no ground whereupon the subsumption or conclusion can be infer'd, seing there is a great difference, betwixt a regular and peaceable time, at least such a time, in which the lawful government & power is in vigour, & betwixt so unhappie a juncture of time, when the same is under Cloud, by the prevailing of an usurping Power; and though in the First case, if there should be any attempt or rising against Authority, if the Subjects should not Joyn in Defence and Assistance of the lawful Power, it were unexcuseable Disloyaltie: yet in the other case where Usurpers have so far prevailed, that the lawful Power is not able for the time to protect the Subjects against the Forces of the Usurpers, being more numerous, and redoubted for their number and Success, the not Joyning of the People and Subjects for the time, with those who adventures to act in opposition to the prevailing Usurpers, can not be construed to be upon the principle of Disloyaltie, but for self preservation; specially seing it did appear how much reason there was to fear, that those Noble Persons, who did adventure to act against the Enemy, would be overpowered by the numerous and prevailing Enemy, seing after they had used all possible Endeavours, they were forced to desist; and if all the people had Joynd with them, they would have been exposed to the mercie and malice of the Enemy. In respect of all which, the Defender ought to be Assoylized frae this Member of the said Article.

As to what follow'd, which is, That he Joynd in open Hostilitie with the Usurpers Forces, specially with Collonel *Overtoun*, *Twisleton*, at the least *Cobbet* and *Twisleton*, at the least *Twisleton*, when he was in the Highlands and in opposition to the saids Earls.

It is alledged, 1. This Member is general; not condescending upon the particular Deeds of Hostility, and therefore inept; for Criminal Lybels ought to be most clear, as is affirmed by *Damhaud*, cap. 30. *prun. crim. num. 4.* and should contain all the qualities of the Crime alledged committed: and as to the Alternative, that he Joynd with one or other of them, it is most Lax and obscure, and therefore in that also this Dittay is inept: and for the Alternative added, at the least he gave Counsel, *non relevat*, because general, except the Counsel were condescended on, and that it was such as might fall under some of the acts lybelled on; and the most that can be alledged, if the time were condescended on of his alledged Joyning is, that he was in Company (it may be) with *Twisleton*, and if it was, he was only going along with him to General *Monk*, being sent for by him, and that when the Earl of *Glencairn* was under Treaty with him, if not after the Treaty was concluded, as was affirmed by the *English*; and the Defender being their prisoner upon demand by his Capitulation vvith General Major *Dean*, in August 1652. It is alledged, 1. That a Prisoner should go in Company, being commanded vvith and to those vvhoose Prisoner he is, is nothing like a Crime. 2. Though that had not been, yet he alledges in answer to that Member of the Alternative, and to vvhat follows anent his furnishing of several pieces of great Cannon to *Alred* Governour of *Air*, viz. That the Defender and all that was his, or in his possession, being under the absolute power of Usurpers, they might command him to go or to call him where they would, with whom to go along, or to bring whatever he had to them; and that cannot be imputed to him for any Crime; otherwise who should be innocent when subdued? must they not

not give to the Enemy of their Goods whatever he would have? and who in Scotland should be innocent? behoved not all to bring to them; that is in effect, did they not take what they pleased? But as for any voluntar going or Joyning in Action with *Twissleton*, or any of the others named in their Service, the Defender absolutly denyes the samen.

Item, For his taking and relieving Prisoners *non relevat*, except the Prisoners were specially condescended on, specially relieving of Prisoners is not relevant to infer any Crime: but on the contrair is a good office to the persons and partie, except it were lybelled that he as an Officer in the *English* Service took and relieved Prisoners, whilk cannot be made appear, whatever the samen might import: but the truth is, the Defender medled not with such things, and the Defender shall truly relate the point of Fact, which he conceives hereby to be meant, which is as follows, The Defender hearing that his Isle and Countrey of *Rosneath* was pilladged, and going up the River *Clyde*, the Boat wherein he was being followed by another Boat, and the Defender having asked what they were, they alledged they did belong to the Earl of *Glencairn*, but could shew no warrand; whereupon the Defender having some suspicion, that they were rather Robbers than Souldiers belonging to the said Earl; and fearing that General *Monck* whom the Defender was then going to, and whom he had never seen till that time, might get notice thereof, and make use of the same as a Snare; the Defender desired them to secure their Money and Arms in the hands of one of his Servants upon assurance, that the samen should be delivered to them after he should be certifiied what they were; and thereafter recomended them, fearing to incur the danger of a privat prison to the Garrison of *Dumbartoun*, not under the Notion of Souldiers serving under the Earl of *Glencairn*, but as privat Delinquents for Injurie done to the Countrie; and at his return after a few days, being tender that they should incur no danger procured the Releasement, and their Names were never enrolled as prisoners to be Exchanged: and according to his promise, caused redeliver their Money and Arms.

As to the following Member of that Article, *viz.* That the Defender took pay from the Usurper for a Companie of Foot under them, and in their Service, Adhering to the general exceptions against the relevancie of the proposition of the Dittay and exceptions against this whole Article, in the beginning of the Answers thereto, specially that it is not condescended under which of the Acts lybelled on this member is subsumed, till which be done the Defender has reason to deny, that it falls under any of them; neither is it relevantlie lybelled to infer any Crime, except it had been lybelled that the Defender having Commission for that pretended Companie for the *English* Service at that time, had Levied or keepest that Companie, enrolled their Names as a formed Companie under the *English* and their Regiments, and ingadged them to the Commonwealth and their Service, because these are required in a Souldier in any Service. 1. That he be *relatus in numeris*, that is to say enrolled, *per le, ex cod. 42. ff. de testam milit.* 2. *Ut prestent sacramentum*, that is that they give their Oath, *l. ex milit. 12. ff. cod & vigit. 2. cap. 6.* or that the Defender had employed them in the *English* Militarie Service, or in the execution of their order, all which the Defender absolutly denyes; they never having been enrolled, giving any Oath or Ingadgment or employed in their Service as said is, but on the contrair. And the truth is, there uses to be in the said Shire, and all other places in the Highlands in

broken times, Watches to keep off Depredations, masterful Rests, and other oppressions amongst the Countrey People themselves and their Neighbours in such times; and accordingly in the Year of GOD 1653, or thereby, the Shire of *Argyle* not being able to entertain the Watch and pay Cels also, not being as yet well planted after the burning, General *Monck* was prevailed with to help to entertain the said Watch: likeas at the same time also, several other Shires bordering upon the Highlands, as *Inverness*, *Perth* Shire, *Athol*, *Aberdeen* Shire, *Stirling*, *Dumbarton*; all of them had Watches the saids times, and allowance therefore frae the said General *Monck*, who within two Moneths did withdraw the said allowance from the said watch of *Argyle* Shire, because they refused to ingage against those who were then in the Hills under the Defenders Son, and others whom the said General *Monck* also alledged that they favoured, and thereupon withdrew his help and allowance for the said Watch, and spoke of the Defender what his Grace pleased: And to convince that this was nothing but a Watch, the men were not in a formed Company, but several Gentlemen in the Shire had the ordering of several numbers of them at convenient and needful places of the Shire, with proportional intertainment, and without subordination as ordinary Souldiers, all which is nortour, and if need beis the Defender offers to prove, and the Duke of *Albemarle* it is hoped will remember how much offended he was that the Defender would not ingage the said Watch against the Lord *Lorn* and his Party, and what prejudice he did still intertain against the Defender upon the said publick account: As also Col. *Robert Lilburn* when the Lord *Lorn* and *Kenmuir* went to *Kintyre* in the year 1653. The said *Lilburn* immediatly upon the notice thereof, having come with a considerable part of the *English* Army to *Dumbarton*, and sent to the Defender to meet him, and to go along with him in *Argyle* towards *Kintyre*, if the said Collonel does not know and perfectly remember that the Defender shunned the meeting, and would not go, whereupon he returned back with the Forces, after he was the length of *Lochblomont*, whereupon the Defender humbly craves that he may be urged to declare; as also that the Countess of *Balcarras* may be Examined if the Defender did not assist her and her Husband in the passage through *Argyle* Shire, as they were going to a meeting at *Finlareck*, for the business in the Hills in the year 1653. Neither can it be alledged that the Defender, or any of his people, did the least prejudice to any person or party that professed to be for his Majesties Service: albeit if he had been so disposed, he had, and might have had several opportunities to have done the same.

As for the Member following, that the Defender called the actions of his Majesties Forces against Usurpers, Rebellion: It is most general, neither condescending on time nor place, and therefore irrelevant and inept; but when condescended on, he nothing doubts but that it shall appear he spoke no such thing, nor had he ever any such construction thereof.

As to the last deed of the said Article, that the Defender in anno 1654. took upon him power to bring off such as were in that Service, and to give remissions therefore; and particularly to *John McDougall*, it is general, neither condescending on time nor person brought of, and therefore inept and irrelevant: and if it be meant only by the person named, viz. *John McDougall* of *Dumloch*, it will never be made out that he was in that Service when the Commissioner his Grace, and the Earl of *Glencairn* were in the Fields, nor
 that

that ever there was a Commission granted by the Defender to him, or to any other in relation to that service.

Article 12. As to the twelfth Article, and first Member thereof, anent the Defenders countenancing and assisting be his personal presence, the Tyrannical and Treasonable Proclamation of *Richard* the Usurper and Protector of his Majesties Dominions, at the Mear Crosses of *Edinburgh* and *Dumbarton*, the Defender is so nottourly innocent of this member of the Article, that he might with much confidence in place of all other defence, simply deny it; but he will do more for defence and clearing of his innocency; that where he is to propone his defence of *alibi*, that year, moneth and day must be condescended on, whereof none is condescended on in this member of the Article; and till they be condescended on it is *inept*, and the Defender ought to be assoilzied therefra: But the days of the said Proclamation at *Edinburgh* and *Dumbarton* *respectivè* being condescended on, the Defender offers him to prove, that during these days he was *alibi*, and neither at the City of *Edinburgh* nor *Dumbarton* all these days.

As to the second Member, anent the Defenders procuring himself Elected a Commissioner for the Shire of *Aberdeen*, at least accepting of a Commission fra them to *Richards* pretended Parliament, and sitting and voting therein as a Member of his pretended House of Commons.

That the *English* Usurpation was one of the most horrid Usurpations that ever has been in *Europ*, against all divine and humane Law, against the most uncontraverted right of the most Illustrious of Kings our dread Sovereign and his most Royal Father of eternal glorious Memory, none of common Sense or Honesty will contravert. Next, The saids Usurpers having nothing but an unparalleled unjust Detention of that Power, whereunto they no manner of way had the least Right, or any Title whatsoever; but in place of a little armed Violence and Force, the only mean (for Title they had none) whereby they both *de facto* attained and violentlie detained that unjust Possession of that power, whereof the only Right was, and Possession ought to have been our dread Sovereigns; whosoever by Arms, Counsel, or otherwise added or abated that armed Force, in establishing *de facto* of the Power in the persons of those Monsters of men, and so in setting up of that abominable Usurpation, that he is Guilty of the highest Treason, is heartily acknowledged.

But the Usurpers having Treasonably thrust their and our Sovereign his Majesty, from all Possession of his just Right; and having taken upon them the supream Power, and being posselt (though most unjustlie) yet most peaceably therein, and keeping the same by Force as they had taken it, the case then became most singular, as to what the poor oppressed Subjects under their Force might do. *Hoc rerum statu posito*, in this state of Affairs, wherein the Usurpers had Treasonably put them, *Lycklama* an most *acut juris consult* eclog. 6. membran. in l. 3. ff. de officiis pretorum observes Learnedlie, that *distinctio fieri debet inter personam ejus qui magistratum gerit (cum tamen jus ad magistratum non habeat) & ipsum magistratum quem gesserit, persona enim ejus est privata, hic publicus, & in publicis non tanta personæ quam utilitatis publica habenda est ratio, ut enim tutela, ait Cicero p. 1. offic. sè procurator reip. ad utilitatem eorum qui Commissi sunt non ad eorum quibus commissa gerenda est & sapientes definiunt nihil aliud esse imperium nisi curam rei alienæ, ut ait amilius*

Marcellinus *lib. 29.* that is *ipſius veip.* So *Lyclama* diſtinguiſhes betwixt the perſon of him who unjuſtly has *de facto* Magiſtracie, whoſe perſon is ſtill but in effect privat, and in the caſe of that Uſurpation a Traytor and the Magiſtracie which he carries, which is publick.

Likeas it would be diſtinguiſhed betwixt Aſs concurring with the Uſurper transferring *de facto* in his Perſon the Power he uſurps, which are Treasonable againſt the lawful Sovereign, and Aſs whereby they oppreſs Subjects, make uſe of the power now uſurped, wherein the Utility not of the Uſurper, but of the Subjects is reſpected; as *Lyclama* obſerves, *ubi ſup.* and then *Grotius lib. 1. de jure belli & pacis cap. 4. num. 15.* ſpeaking *de invaſore imperii* of an unjuſt Invader, while his Poſſeſſion remains unjuſt, ſayes, The Aſs of power is binding for the good of the Commonwel; and becauſe it is probable the lawful Governours will is rather the Uſurpers Command ſhould be obeyed or take effect, than that Laws and Judgments ſhould fall in conſuſion in thir Terms, *Reſtat ut de invaſore imperii videamus non poſtquam longa poſſeſſione vel pacto jus natus eſt, ſed quamdiu durat injuſta poſſidendi cauſa,* yet, *quidem dum poſſidet actus imperii quos exercet vim habere poſſint obligandi, non ex ipſius jure, quod nullum, ſed ex eo quod omnino probabile ſit cum qui jus imperandi habet, ſive populus eſt, ſive rex, ſive ſenatus, id moſo interm rata eſſe qua imperat quam legibus judiciisquē ſublatis ſummam induci conſuſionem,* and *Leſſius* who is one of the Authors *Grotius* cites upon the place, ſayes in the place cited, *viz. L. 2. de Juſtitia & jure cap. 29. dub. 9. ff. 37.* that *Tyranni uſurpatione poteſtatis mandatis obtemperandum propter bonum commune,* which is, that the Tyrann and Uſurper is to be obeyed even from the Law of Nature for the publick good in ſuch eſtate of Affairs; and adds *alioqui omnia eſſent plena latrocinii & furtis,* that is all will be full of Robberies, Thifts and conſuſion in that eſtate of Affairs, becauſe of the Uſurpers force the uſe of no other Government can be had, ſua that the neceſſity of the benefit of Government for the good of the Subjects or Commonwel (ſpecially in what relates *ad reip. ſtatum* in things neceſſary for the ſtanding of the Commonwel, or to evit the ruine thereof) and the interpretative and preſumed conſent thereupon of the Prince who has the right to the Authority whilk the Uſurper has Uſurped, but is excluded by the Uſurper ſtrae benefitting the Subjects by it himſelf for the time, are the two Grounds whereupon the making uſe of the power now in the hands of the Uſurper, is founded as ſaid is: wheredpon it is ſubſumed that in our caſe the Invader and Uſurper *Oliver* having violently taken upon him the power, after he had put his and our Sovereign from the Poſſeſſion thereof; and oppreſſed by his Armed Force this Nation, and amongſt others the Defender, and *Oliver* having kepted the Poſſeſſion all this time, and *Richard* continuing the ſame, the benefit of that power whilk now he had uſurped and whereof he was in Poſſeſſion, was ar always it is ſo neceſſary for ſtanding of the Commonwel, that without it men becomes but as Fiſh in the Sea, the leſſer a prey for the oppreſſion of the greater. But ſpecially the ſaid *Richard* having called a pretended Parliament and commanded the ſhires to ſend Commiſſioners there to meetings and Representatives of the Nation, as they are of great uſe at any time for treating common Affairs of common conſent, ſo tranſcendently at that time for moderating the arbitrarie Tyrannie of an Uſurper, and that not being able to expugn his force, they might by ſtrength of common counſel overcome and perſwade his reaſon to things abſolutely neceſſary for the ſubſiſtence, at the leaſt
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the preventing the ruine of the whole Body of thir Kingdoms, and of his Majesties Leidges therein, as was the stopping that miserable union which the Defender knew that it would be as it had been before at every other Parliament; so that at that strongly he attempted, as indeed thereafter it was, which union was that *vorax*, wherein our Religion, our ancient Government Monarchick, in his Majesties Person and Family; and the interest of Nobility and our Liberties were wholly swallowed up; and under pretext of being united, we were really enslaved to that pretended Common-wealth, the easing (if they could not perswade him to the taking off) of the Maintenance and Cels whilk upon *Scotland* was *sextriple* more than the proportion of *England*, and in it self so heavy, with the Excise and other Publick Burdens laid by the Usurpers on it, that more was exacted in one Month than his Majesties Royal Predecessors would have imposed or taken of Taxation for an age, so that the Countrey could not subsist under it. As also, taking off some of the Forces under which we were kept in bondage, if that at least could have been obtained, the prevention of the alteration and change of our whole Laws, which was vehemently threatned, yea, and in general the confounding, and *dolo optimo* circumveining and defeating of their counsels, by which the event proved, it was more hopeful and easie to overcome that force than by might or power. And as the liberty of the Election of the Members in *England* at that time of *Richards* Parliament, made service to his Majesty in it, hopeful to all his Majesties friends and loyal Subjects, so was it no small encouragement to the Defender to go there for the same end: And at that meeting in the Committee of *Scots* Affairs, and at several other meetings when they were upon the debate of the said Union, the Defender of purpose to stop the same, did propone that there could be no union except it were agreed that we might enjoy our Religion in *Scotland* without alteration, as it was established by our own Laws, and that we may be Ruled and Judged according to the same Laws, and except our Cels were proportioned according to theirs in *England*: All which conditions the Defender knew would never be granted, & were indeed so utterly improbable at that time, that the proposition thereof was construed to be for no other end than for the end aforesaid, to stop the said Union. Likeas it did so well succeed, that in effect it did obstruct it; and the several persons of quality that were present can, and if need be will declare: And at that meeting the actings and usurpation of the Usurper *Oliver*, and the oppressions of that Army were of purpose much called in question, to make that Government and them odious, whilk accordingly happily followed, and such a breach and confusion among them was made, that their affairs thereafter could never come to any consistence, which made considerably and evidently way to his Majesties happy and glorious restitution. To all which joyning that the call and command of the Armed Force has *parendi necessitatem*: And necessity of obeying lying upon persons under their power, it will follow fra what is alledged out of these above cited Authors, founded strongly on reason, the Defender in that estate of affairs had necessity, and some obligation to go and essay what could be by counsel, wisdom, and prudence (since now there was no strength nor might left effectual for the standing, at least to evite the ruine of the Countrey in the particulars above-mentioned, and others of that nature, at least the Defender, as all of us were under their force, and for eviting of his own and the Countreys ruine, *habuit parendi necessitatem*; and by consequence there was no design of Treason therein,

therein, but by the contrair, most loyal intentions upon good ground of hope, and very probable appearance, and therefore it is hoped that the Commissioner his Grace, and the Estates of Parliament will not find this Member relevant to infer so high a Crime against the Defender *hoc maxime attento*; That beside the publick ends, it was even a necessary self-preserved Act, for the Defender had several other things of personal interest, as that they had ordained him to pay to them about 4000 pounds *sterling* for alledged Feudal duties aughtand, and in time coming so much, that both joyned he was not able to bear, and if need be it is offered to be proven, and that he was most rigorously prosecute for the same, not only threatening to use real execution against his Estate, but also to Imprison his person; for eviring whereof, he behaved at that time to go up to *London*, and could not have his person secured from Arrestments there, but by going in Commission. And it is known that his Majesty is so gracious, as in not a few to excuse what they did in that nature to evite, but though their own personal prejudice, not imputing it to unfaithfulness in them at such a time; But there being so much necessity both publick and privat for some compliance, His Majesty was even so gracious as to give to severals allowance to comply, whilk the Defender could not take expresse, because he was their Prisoner, and under Capitulation; yet what his Majesty had given to others, he conceived humbly he had some reason to presume that His Majesty would approve, at least not question what he should do of the like nature upon the same, yea and much greater necessity, and according to whose glorious and imitable example, it is with much confidence hoped that the Commissioners Grace, and Honourable Estates of Parliament will have a favourable construction of what the Defender did in that particular, being necessitat thereto both for publick and private Interest, without any Dole or Fraud, either in the Intention or Event, their being nothing at that time while the Defender was there, done for confirming the Usurpation, or excluding his Majesties Interest: Likewise, it may appear that it was only the Concourse both of publick and private Interests and necessities fore-said to move the Defender to go at that time, because though he was desired oft-times of before to go, yet he still refused till then, and he was one of the Last that went, that being the very last pretended *Parliament* under their Power, and not till long after that Commissioners had gone for the Nation for several years, and that all had submitted to their Constitutions, which were of necessity made use of at *Laws* for the time.

And in this also, as was before Answered to that part of the eleventh *Article*, anent his not Joyning with these Commissionat from his Majesty, there is a great difference betwixt a Regular and Peaceable time, at least such a time, in which the lawful Power and Government is in vigour, and so unhappy a juncture of time as this was when the Defender went to the said Meeting, when not only the lawful Government was under Cloud, but all things so Black and full of Despair, that there was not in humane probability the least ground of hope, that the lawful Power was able for the time to protect the Subjects against the Lust and Tyranny of the Usurper and his Power and Force, or to Redress their Grievances, or ease their unsupportable Burdens, nor could it be known, nor was there any probability, both the Defender, and all the Subjects might have been Ruined before the lawful Magistrate should be in a capacity to do the same, and recover his just Right, in which unhap-

py Conjunction; if it was not lawful, it was at least most excuseable and expedient, if not necessary, to use endeavours for publick or self Preservation. And it were hard in this case, where the Defender neither in intention or event did contribute any thing to the Usurper's Establishment, or in prejudice of the lawful Magistrate his Right to make a strict inquirie, or to examine Actions by the strict Rules of Law, as in a peaceable time, and not to circumstantiat that Action from the time and necessities, both publick and private that induced thereto, being such a time as when the Usurpers had overturned all Laws Divine and Humane, was tyed to no Rules, but his own Will and Lust, and when there was no visible Force, either for the lawful Magistrate, or in the Kingdoms to controll or give check to his Lawless, Boundless and Arbitrarie Power and Usurpation, and in such a time when in effect all Law was overturned and trampled under Foot, for such a necessary and self preservative Deed to punish the Defender, or infer so great a Crime as Treason for the same, Especially, where the whole Nation was also Guilty of the same, is in all humility hoped not consistent with that innate Clemency that so much abounds in his Royal Majesty, or with that Mercy whereby his Majestie's Throne is, and will continue Established; but that rather in so universal a Guilt he will pardon this Failing of the Defenders (that he be not the singular Sufferer upon this account) as he has done to the whole Kingdoms and so many others, to the Glory of his most renowned Clemency, and never to be forgotten, but constantly to be acknowledged Mercy.

As for the Aggravations of this Member: And to the *first*, That because of the Defenders Nobility, he was incapable to be Elected, at least might have Refused. It is Answered, that it is nottous, Nobility was not then respected at all, nor was any ground of Excuse, the Meeting to Elections being Commanded to all as Heretors, and so Noble-Men and other Heretors met promiscuously through all the Nation, as is nottously to all known; And whereas it is libelled that he had not his Residence within the Shire, ought to be repelled as irrelevant, non-residence, not being sustained *per se*; because it is true, and was known to the Usurper and his Ministers, and Underlings, that he had Land within the said Shire, and that Considerable, so that he could not decline the said Imployment without prejudice, the Will and Lust of the Usurpers at that time being uncontrollable, and tyed to no Rules of Law and Justice.

And where it is Inferred, that by sitting and Voting in that pretended *Parliament*, he acknowledged his Majesties Power and Interest to be in the Usurpers Person. It is Answered, 1. He acknowledged the same no otherways, but as all the Kingdom did, to wit, *de facto*. For *de facto*, the Usurper had taken and Possessed himself of the Power, as his Majesty is pleased to speak of it in his *Proclamation* anent Commerce with *Portugal* in *October* last, and had detained the same for a long time: But neither the Defender, nor any other Loyal Subject ever did, or will acknowledge that *de jure*, the same belonged to him, or that he had any just Right, or lawful Title thereto; as also, *Lessius* says in the above-written place, speaking of them that seek from Usurpers, that use of Government, whereunto he says they are holden, and obliged once taking on them the Government, though sinfully and unlawfully they seek the Benefite of it, says he, not absolutely, but under a *tacit* Condition, *viz.* if the Usurpers will take upon them the Government, *Retunt* (says he) *sed tacita quadam conditione si velit se pro Principe gerere*,

speaking of the Usurper, and that the Usurper would not give the use of the Power he had taken upon him, but in the way he pleased was his Crime, whilk he continued during his Usurpation, in respect of all which it is humbly conceived that the Defender ought to be Assoiled from the Crime of Treason libelled thereupon,

Likas, for the Defenders further clearing in this particular; It is humbly desired that certain Ministers and others above exception, whom the Defender shall condescend on may be Examined; if after his return from *England* in anno 1648, he did not express with great joy his hopes, that Business in *England* did tend towards his Majesties advantage: *Item*, that Commission might be direct for Examining of Sir *Anthony Ashley Couper*, and several other *English-Men* above all exception, how the Defender expressed himself in private anent his Disaffection to that Usurpation during his being there the time of the said Parliament, even though to his very great Hazard at that time. *Item*, that certain Persons upon whose Names also he shall condescend may be Examined; if the Defender to their certain knowledge, the time of Sir *George Booths* rising (which fell out immediately after the Defenders return from the said Parliament) did not put himself out of the way, being informed that he was to be Secured; and thereupon delayed his Journey to *Caithness*, and so readier to have laid hold upon any Opportunity that should have offered for his Majesties Service and Restitution, that time being the most probable as he conceived that ever offered after *Worcester*:

As for the Precept 12000 *Pounds sterling*, which is alledged the Defender got from the Usurpers; It is Answered, the Defender did indeed obtain a Precept, but not as a Reward of any Service, which he never, neither did, nor desired to deserve from them, but for what they had Wrongously intromitted with of the half of the Excise of Wine and Strong Waters, whereunto the Defender had Right by Act of Parliament before they had any Power in *Scotland*, and of which the Defender got not Payment.

As to the thirteenth Article, First, for the haill Article, it is not condescended on what Act of Parliament, the samen consisting of three different Members, is subsumed, and till it be condescended on, there can be no Process thereupon. And as to the first Member thereof, anent the words alledged spoken at *Inverary*, 1. No time condescended on, and therefore the Libel in that part is inept, for the Reasons above-mentioned, for which a Criminal Dittay ought to be special in the time, at least Year and Month. 2. Whereas it is libelled he rebuked the Minister for praying for the King in the words libelled, or some such like words, *non relevat*, the Minister, except the person were condescended on, whom he rebuked. 3. *Non relevat*, some such like words, some such like being most general, except the words were particularly libelled, alledged to be such like, whereby the Defender might advise his Defences, and alledge why they were not such like as he would, if any words ever he spoke were condescended on, for the truth is, he never spoke any such words, and was so far from rebuking any for praying for the Kings Majesty, that after the Defait at *Worcester*, (whilk is the general time libelled wherein he should have rebuked the Minister for praying for the King) he himself caused continue praying for his Majesty, both in his *Paroch-Church* and in his own Family, yea even in presence and audience of the *English* when they came there, though it was to his great hazard so to do.

As to the second Member, Anent the words libelled, and alledged to have been spoken by the Defender at London, that he wondered how People should be so mad as to call home a Family whom God had rejected, and would never restore again, or some such like words. 1. This is also general, neither time, that is Year, nor Month, nor particular place condescended on. 2. Seeing it is libelled that it was in the presence of persons of Quality, they ought to be condescended on. 3. And in sua far as it is libelled, the Defender said People was mad to call home his Majesty, it is general and inept, not condescending what People, and what was the occasion, if there was any Motion-making of calling home his Majesty, whereupon that should have been spoken, and among whom it was; and *Damhous cap. 30. Prax. Crim. num. 4.* and others says, a Criminal Dittay should be most clear, and contain *omnes criminis patrati qualitates, l. 3. ff. de accus. & Bart.* and others *ibid.* that it should contain all the qualities of the Crimes alledged committed. 4. Some such like words, *non relevat*, except the words were specially condescended on, whilk if they were, the Defender would alledge and evince they were no ways such like, for the truth is, he never spoke any such words, but on the contrair, did all he could there to make way for his Majesties happy Restitution, as has been at length cleared of before, and was a very suspect person, in sua far as in the year 1647, Oliver was so jealous of the Defender, that he commanded him to stay at London, and not return to Scotland till his Affairs (as he was pleased to express) were settled; so that not without great difficulty, by the Mediation of the Lord Charles Fleetwood, he obtained his liberty, whereupon he desires the said Charles Fleetwood to be examined, whilk he also desired at London; and not only was he suspect, but odious to the English for his known affection thereunto, as is nottour, and has also of before been cleared.

As to the third Member of that Article, Anent the alledged Speech in *Maisterious*, 1. Neither Year nor Month condescended on, and therefore general as to the time, and inept. 2. As to the first part thereof, that he would owne anything he had owned. 1. It is exceedingly general and *non relevat*, except what were the things he had owned, were specially condescended on, and what Time, Years and Months; it is an unparalleled generality, and therefore till made special, no Process thereupon. 2. It can import nothing in common sense, wherein to owne a thing, is to acknowledge it for a mans own, but that what he had acknowledged to be his own, whether Words or Deeds, he would yet acknowledge, which is an expression of Ingenuity and no Crime; and this being the received sense of owning, the words cannot be strained to any other sense; or if occasion should be taken so to do, and that any other sense could be put upon that Expression, yet *benignior interpretatio capienda est*, the most benign Interpretation is to be taken, *per l. ea qua, §. 1. ff. de reg. juris*, as being both justest and safest by that Law; and in ambiguous Speeches, or such as may receive two Senses, every man is the best expounder of his own Mind, and his Interpretation ought to be admitted, *per leg. in ambiguis, ff. de reg. juris*, and other Laws: but the sense aforesaid is so plain, that there is no place for Caption.

As to what follows in the said Member, That if what he had owned or done were to do, he would do it again, albeit he had known that all that has been would have come. 1. As has been alledged against the first part of this Member, this is exceedingly general, both as to the Time and Month, he should

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have spoken it on. 2. As to what the things are that he would do if they were to be done, and what times the things were done or owned to be done on, that the saying that he would do if they were to do is a Crime. 3. What are these things in particular that are understood, or may be subsumed under the general of all things that has come to pass, whereupon it may be inferred, that it was a Crime to the Defender to have said, that notwithstanding of them he would do what he had owned if it were to do, and therefore the Libel in this part of the Member, is also general, obscure and inept; and to evince the ineptitude of this generality, suppose the Defender was thus indyted, *you are indyted* for all that you have done the times bygone, preceeding your being in *James Mastertouns* House, after your coming from London, were not that Dittay, without all controversie irrelevant, then is it not als irrelevant to be indyted for owning in general what he had owned, or saying in general, that he would do what he had owned during that time, if it were to do again, without any farder particular condescendance. Likeas 4. There is a very clear and obvious sense these words may have, (if ever he spake, as he truly never remembers that he spake any such words,) viz. that if it had been possible that times could have returned, and actions to be done under the same circumstances and representations they had then, it is probable these same might be the Defenders actings again, though he had known what had come thereafter, not having connexion with or necessary dependance on these actings, whilk does not so much as import his present thoughts or approbation thereof, but is very consistent with a present disapprobation of the same, and is it not most ordinar to say, that if such times were as has been, or such motives or circumstances of Actions as has been, that it is very like I would be engaged in them as well as others, or as I have been my self, and yet to say with great consistence, I think I might not so do, likeas truly it is known, and if need be is, is offered to be proven, that the Defender on the just contrary had said to a Counsellor of *Cromwells*, and to many other famous Gentlemen, that things had been done, wherein he would have been very far from engaging in, if he had seen what followed, whilk was the product of the Corruption of evil men, that had abused what was well intended for the accomplishing of their wicked and (till they brake forth and could not be resisted) unknown designs, and the Defender hopes the sense aforesaid is very clear, and even tho it were not so obvious, yet *rapienda est occasio quæ benignius præbet responsum*, l. *rapienda* 168 ff. *de Reg. Juris*, that is an occasion should be even rest (as it were though there were some violence done to the words) for a benign answer and Interpretation, and therefore by all means that Interpretation of the words that may seem to infer a Crime ought to be eschewed, or if the words might be drawn to any other sense, yet in *dubiis benigniora preferenda sunt*, as has been, said, in Speeches dubious the most benign sense is to be preferred, per l. *semper* 56. ff. *de Reg. jur.* or where words are obscure and may suffer two senses, the parties own Interpretation is to be taken, as the best Interpreter of his own mind, per l. *ea quæ* §. 1. ff. *de reg. jur.* and *odia sunt restringenda, favores ampliandi*, what is odious (as is that which may infer a Crime against any should be restricted & favour amplified, & in general the Judges alwise to be more enclined to absolve than to condemn: and so consequently to take the sense that may assoilzie, rather than that which may condemn; leg. *Arrianus* 47. ff. *de oblig. & act.* 5. The Doctors say, That *voluntas & propositum delinquenti distinguuntur*;

distingunt facinora per legem expressam, leg. qui injur: 53. ff. de furtis in prius that is, the Will and purpose of him that commits a Crime distinguisheth it; But *velleitas* or *voluntas inefficax*, as it is called, not a Will but a Would, is no purpose to do and can be the cause of no Crime, especially being about things past and qualified with an impossible Condition, if things already done were to do, whilk is altogether impossible that an action done should return to have a new being and so to be done, and even there is some Presumption of what mistake may be in this fra the very place lybelled, in which it is alledged to have been spoken, it being such as it is not improbable that men may be very apt to fail both in Judgment and Memorie, and so both wrong themselves and misconstrue others.

As for the Aggravations that follows, that by speaking these words the Defender took upon him by outward Success to give Judgment upon the secret Counsells of the Almighty. 1. As it is no ways true that the Defender spoke any of the words lybelled, so this does (as he humbly conceives) in no ways follow upon the words immediatly going before, alledged spoken in *Master-touns*, viz. that the Defender owned what he had owned, or would do the same if it were to do, for that is not Judgment given of any hidden Counsel of the Lords, but an expression at most of his own Actions, and as for the words before these, albeit he had been so presumptuous as to say them [as he blesses the LORD he never was] yet it is not lybelled that any thing that's therein alledged to have been spoken either at *Innerary* or *London*, was spoken or inferred fra providence and success, for the Defender blesses the Lord, he has been otherwise taught than to use (or rather to abuse) so Turkish an Argument, and whilk the LORD has by his Majesties Restitution so signally refused.

And as to the last Aggravation that the Defender thereby hardned others such as were otherwise ill disposed in their wicked Courses towards his Majesty, it is indeed a sad Reflection upon others herein not called, however, 1. It is so general both as to these others and their Courses that it cannot, and the Defender hopes it shall have no weight; Especially considering, that 2. The Defender opposes his Defence of before alledged against all the members of this Article, whereby it is clear that as they are lybelled they can infer no such thing; In respect of all which the Defender ought to be assoilzied also fra this Article of the Dittay.

Last Article, As to the last Article, 1. It is not condescended under which of the Acts of Parliament lybelled on, it is subsumed, and till then it is ineptly lybelled and there can be no Process thereupon. Moreover the Defender has the testimony of his own Conscience, yea and of a higher, that nothing lybelled therein is true, Albeit if he had said the Usurpers hazard was great from his Majesty, and if his Majesties designs took effect they were ruined, the same were nottour Truths, and it ought to have been so, that is ought to be, and it is good they were in hazard fra his Majesties Designs; And it was most just that his Majesties designs should take effect to their ruine, and what Crime could be in so saying, he could not apprehend, however he never spoke any such Words to *Cromwel* or *Iretoun*, which *Iretoun* he never saw with his eyes, and did far more abhor the least thought of giving counsel to question his late Majesty upon his precious Life, and in his innocence shall rest confident, absolutely to deny the same.

As to the last part of this Article whereby it is lybelled, that in anno 1649 in face of the Parliament then sitting, he told that the Usurper *Cromwell* had told to him, that *England* and *Scotland* would never be at peace till the King were put to death. The Defender adheres to this part to the general exception against all this Article. That it is not condescended under which of the Acts of Parliament libelled on, it is subsumed, till which be done there can be no Proces, and if it be intended that it be subsumed under the 23. Act 2. Par. Ja. 1. and the 134. Act Par. 8, and 16. Act 16 Par. and 203. Act 14 Par. Ja. 6. All those Acts as both by their Titles and Tenors, and by S^{er}mons in his Index on the Words Leasing-makers appears, and it seems by their Conjunction in this Lybel, they are understood also therein of Liking and Slandering His Majesty and His Progenitors, &c. And the words lybelled, tho' very horrid, yet seems to be of another Nature. And 1. To that 203. Act, Par. 14. Ja. 6. whereon only any thing can be subsumed against him for concealing and not apprehending. 1. It is general as to the time when *Cromwell* should have told it to him, and therefore inept till the time be condescended on whilk must be, especially seing if it be condescended on to have been after the ingagement was broken, nothing can be subsumed on the said Act thereupon against the Defender, nor on his not apprehending him, for he was not holden thereto by that Act expressly, except (according to Law) it had been in his Power: But so it is, it is known that at that time it was not in the power of the whole Kingdom to apprehend him, whether his Victory and Strength be considered, or the Kingdoms low and weak Condition at that time, wherein they lay open to ruine by him, if the Lord had not restrained him, more nor their Power could effectuate: and as to the concealing and not revealing, the Defender ought to be assilized; Because by the exprets words of the Act, that Revealing is declared to be such a revealing to some of his Majesties privy Council, or some under officer, &c. as that therethrough, the Authors of slanderous Speeches may be called, tryed, and punished according to the other Acts aforesaid: By which it is clear, 1. That that Act is not understood of a Foreign Invader and prevalent Enemy not subject to our Laws and Acts. 2. That the not revealing meant, is, when through the revealing, the Authors of Speeches may be called, tryed and punished, but that cannot be subsumed, except it were subsumed, that the speeches were spoken before Witnesses, otherways they could not have been proven, and without probation, could not have been so tryed, as that sentence could have been given thereupon, and the Author punished according to the words of the Act (whilk is also according to common Law, as is hereafter cleared) likens if the words should have thereafter been found treasonable, and the Defender not being found able to have poven them, he should have brought himself under the crime of Treason for accusing another of Treason, and not being able to prove it, and therefore could not be holden so to do: As also, albeit the Defender had heard any such words as is libelled (whilk he altogether denyes) and that before Witnesses, yet through his revealing thereof, the Author could not have been tryed or punished, for it is nottourly known, it was above the power of the Kingdom at that time as said is, or for many Years thereafter to punish him: And therefore the Defenders not revealing cannot be subsumed on the said Act of Parliament to infer the pain contained therein, or related unto. Lastly, the pains of the said Act, and other Acts before mentioned, together therewith, is not the pain of Treason, as has been of before evinced, and there-

fore the Dender cannot be convinced for Treason, or the pain thereof upon the saids Acts, but ought to be assilized therefrae.

But if this Member of this Article be intended to be subsumed under the last part of the Proposition of the Dittay, whereby it is libelled, That by common Law and practise of this Kingdom, all Conceallers, and not Revelers of any malicious purpose of putting violent hand in the Sacred Person of his Majesty, or purposing of Killing or putting him to death, are guilty of Treason, the Defender protesting his innocency in never concealing any such purpose, nor the words foresaid libelled, which he abhors, he is so far from justifying thereof, judging that horrid Murder of his Majesty to have been the very Ruine of our Peace and Happines, yet as to the Relevancy of that part of the proposition, in swa far as is founded upon common Law and practise only, the Defender becaule of the preparative repeats what was before alledged in the Answers to the Proposition in that part thereof, and adds further, that upon the Qestion *in crimine lesa Majestatis* in the crime of *lesa Majeste num: sciens tractatum proditoris contra principem vel Patriam & illum non revelans sit puniendus pena mortis*, that is, whether he that knows a Treaty about Treason against his Prince or Country be punishable by Death, *Clarus l. 15. §. fin. prac. crim: quest: 57.* says that many holds he is not punishable by death, and that *Cagnol: in his l: culpa caret ff: de reg: juris, num: 2:* says, that that is the common Opinion, citing also *Alciat: in Li: tacere ff: de verb: sig: & in l: Bona Fide num: 20: ff: de pos. & in l. 4. §. Cato num: 30. ff: de verb. oblig.* related also by *Gigas de crim: lesa Majestatis fol: 180. num. 10. Roland. cons. 88. num: 10. lib: 2:* and that *Caver. pract. crim. fol. 253. num. 29.* saith, That all others follows this Opinion, and that *Baldus* cryes out in a certain Council, that becaule *Bartol.* held otherways, therefore his Soul for that as a crime, is tormented in Hell, wherein it is clear even by *Clarus* acknowledgement, That concealing and not revealing in the case propoted by *Clarus* (whilk is very high Treason) is no Treason by the common Opinion of the Doctors, according as is asserted by the famous Authors he cites, and whom he contradicts not therein. 2. And *Clarus* nothing contradicting, but this is the common Opinion, albeit he be of another with *Bartol.* that it is capital to conceal, and not to reveal, yet it is only in two cases, to wit, *in tractatu qui fiat contra ejus personam vel statum*, that is, where he has been conscious to, and known any Treaty or Consultation against the Princes Estate or Person; but as for other Cases, he holds expressly, that the Concealer, and not the Revealer, is not punishable by Death in thir words, *in aliis autem casibus etsi sunt comprehensi in crimine lesa Majestatis non putarem esse puniendum pena mortis subditum qui non revelaverit*, and that he Counsels Princes, even in thir Cases, to use Clemency and Humanity rather than Severity, and to excuse their Subjects upon any probable Cause frae the pain of Death. Whence, 3. It is alledged, even according to *Clarus* his Opinion concealing is not relevant to infer the pain of Death, except where the Concealer has been conscious to, & heard some Treaty, that is deliberat Consultations against the Prince or his Estate, but swa it is the words libelled, especially what is alledged to have been heard in the Parliament 1649, seems not to import that, being as would appear but *voluntatis verba* (if any such had been heard, which the Defender denyes absolutely) and importing indeed the Author *Cromwells* thought or Opinion, that there would be troubles still, so long as his Majesty (*horendum dictu*) were not put to death. But *Clarus lib: 5. prac. crim: § fin. num. 87.* distinguishing

betwixt *cogitationem nudam*, a naked Thought, and *tractatum*, or a Treaty, or consulting, he affirms that a naked or sole thought is not punishable in any crime, no not in lese Majesty, except only Heresie, whilk is a crime perfected in the mind. And thereafter *num. 2.* he moves the Question, *sed pone quis non statuerit in meris terminis cogitationis sed ulterius etiam processerit ad tractatum cum aliquo de ipso maleficio committendo*, but says he put the case that any has not contained himself within the bounds of a Thought, but has proceeded further to treat with any for committing the Crime, &c. Thereby making a clear difference betwixt a sole Thought and a Treatie about committing the Crime: now the words as they are lybelled do not import any Treaty with any for committing that horrid Murther, but the signification only of *Cromwells* damnable Thought, what might be the consequence of not taking of the Life of our then dread Sovereign. And hence, 3. It will follow, that these words can not be subsumed relevantlie under that part of the proposition of the Lybel, because that any sense these words seemed to have as they are lybelled, would appear only to import his naked Thought of what may be the consequence of not taking of the Life of our then dread Sovereign, but no purpose of his to take the same, neither could any presume, albeit his thought anent that Consequence had been true; (as it is most contrair to the Truth) that yet any man in whom there had been the least spark of common Reason or Conscience, would have purposed to commit or committed one of the Highest Evils of Sin to evite, though very great Evils of Punishment: It being a received Rule among men, at least among Christian men, that the least of the Evils of Sin should not be committed, to evite the greatest Evils of Punishment. *Gomez*, a most excellent Lawyer is clear in his third *Tome variarum resolutionum de crimine laesa majestatis num. 8.* that concealing even of Treason is only then punishable when the Concealer might prove it, otherwise not. *Per text. leg. nostris in fin. ff. de calumniat. & leg. qui accus. Cod. de edendo*, whereby its said, that whosoever counsels to Accuse should have his Proofs ready; and who Accuseth Falsely, shall be punished as the Party accused would be, if the Accusation were proven. *Gomez* citeth the Cannon Law, *Platia*, *Hippolatus* and others for their exceptions, whilk a *Fortiori* holds in one Law, whereby, by the 49. *Art Parl. 11. Je. 6.* Accusing of any of Treason, not being able to prove so, that the Partie accused be acquit, being so far reprobated by our Law, that it's declared, that thereby the accuser shall incur the same Crime of Treason whereof he accused the other, is a sufficient Warrant to the Defender, not to have revealed that of *Cromwel* (if their had been any such Speech, as the Defender never heard any such) except he had Witnesses to have proven it, whilk neither is Libelled nor can be alleadged, and therefore he ought also to be assoilzied thereof.

5. All these Laws anent Concealling and not Revealling as the Defender humbly Conceives, must be understood, where the Treason is privately Plotted, and the Execution thereof carried on by secret Conveyance, and which by revealing might be crushed and prevented. But it is not our that the Usurper as he had the power of armed Force, so he had the unparalleled Boldness to carrie on his execrable Treason most openly, and that his Power was such as it was impossible to his Majesties poor Subjects of this Kingdom, no not for his Majesties Subjects of his other Kingdoms though far more powerful, and that many Thousands of them frae their Soul abhorred the said *Art* to prevent and impeded the same, and if the Defender had heard any such Words of the Usurper, as he has just reason to deny he never heard whatever they should import, what probable reason might have been for not revealing at that

that time, fra the Prevalencie & power of that Enemy, the condition of our poor Countrey, and utter impossibility to bring him to Punishment; besides the want of Probation: And so what place they were to *Clarus* his Counsel of Humanity, the Defender laves to the Commissioner his Grace and honourable Estates of Parliament to Judge.

6. Whatever relevancy there were in the Defenders concealling, yet his acknowledgement thereof in Parliament 1649, as Libelled *non relevat* to infer or prove it. 1. Because a Confession that prejudgeth a Partie must be judicial, that is *in iudicio idq; utroq; iure et civili et Canonico* as sayes *Panormitan C. ex parte decret. de confess. num. 16*, that it must be in Judgment in a Proceſs wherein he who confesseth is conveyned as is clear by leg. 6. *ff. de confess.* where the words are *si dum quis Convenitur, Confiteatur*, that is if any be conveyned, confess, &c. and *Panormitan dicto* who sayes, that to the end a Confession may preiudge him who confesses, it must be among (others requisite) *super re litigiosa*, that is, on a thing litigious, or a thing in Dependence or Proceſs, per *L. in confessionibus, ff. de interrog. art.* The words are *confessionibus falsis respondentes ita obligantur si eius nomine de quo quis interrogatus sit cum aliquo sit actio*, that is any in making Answer, is obliged by false Confessions, if there be an Action (or dependence) against him upon that whereupon he was Interrogat & confesses; and *Panormitan* is exprels *loco ubi sup.* that *non valet confessio facta coram iudice tanquam in iudicio nisi iudex ad hoc sedeat per Bartol in L. si confessus ff. de custod. reorum*, that is a Confession is not valid though made before a Judge as in Judgment, except the Judge be sitting on that Business: Whence it is clear that the Acknowledgment Libelled is no ways relevant to infer against the Defender what is Libelled to have been thereby acknowledged, except it were Libelled that he had been in Judgment conveyned thereupon, or that there was a Proceſs depending against the said Defender, wherein he had confessed what is Libelled in Judgment, and the Parliament had been sitting on that Proceſs; But sua it is that neither is it nor can be Libelled; and therefore his naked Acknowledgment is not relevant: And in Effect if in any Discourse before the Parliament any such words had escaped the Defender (whilk he no wayes acknowledges) yet that such a passing and indeliberate Word should infer or prove a Crime or so high a Crime against him, he is hopeful the honourable Court of Parliament will be very far fra ever finding. For the reason why Confession has so much Weight, is because it is presumed that no man will confess against himself in Judgment, that whereupon he is conveyned and proceſsed without great Deliberation, whilk holds not if their acknowledgment be given out of any Proceſs, their being no Dependence, Action or Proceſs upon the matter thereof, and therefore the Defender is confident, that he needs not trouble the honourable Court with more legal Dispute against the Relevancie of the alleged acknowledgment.

7. The words of Acknowledgment Libelled as spoken in the Parliament 1649, can never be obruded to the Defender, nor that he was conscious to the Counsel of that horrid Murder of his late Majestie, because it is nottour, and he offers him to prove it need be is that the whole Members of the said Parliament 1649, and he himself amongst others in plene Parliament, were purged by their Solemn Oaths of all Knowledge of, or Accession to that wicked Design, in Relation to the Kings Majestie and Houses of Parliament;

8. And yet he is so confident he never spoke any such thing in *Parliament*, that the Day being condescended on, and Dyet of Sitting of *Parliament*, as by all *Dofors* is agreed, it ought to be when the Defender offers to Prove his *Alibi*. He offers to prove (if need beis) he was *Alibi* all that Dyet, and so not in *Parliament*, where he is alleadged to have spoken these Words.

And in regard the Deeds libelled, are either such as preceeded the Treaty, and *Act of Oblivion* in anno 1641, and were thereby Pardoned, and Buried in *Oblivion*, or such as interveened after the Year 1641, before his Majesties home-coming in the Year 1650, during which time he is in this Libel charged with several Deeds which are irrelevant, and whereof the Defender is most innocent, and for such publick Actings as the Defender is Charged with, and had Accession to; The Defender is also Secured, and Pardoned by his Majesties Treaty, and Gracious Condescendance at *Breda*, whilk was also thereafter Ratified in *Parliament*: Or, are Deeds of necessary Compliance, both for the publick and self Preservation in that unhappy juncture, which Compliance, as it was fore against his Inclination, if it had been in his Power to have helped, so is not, no more nor the whole Kingdoms did, and far less than many Condescended to; It is in all humility expected, that the Defender should not be brought under the Compass of Law for the same, whilk were to make him the singular Sufferer in so universal a Guilt. So there can be no Precedent therefore instanced, either out of *Scripture* or Holy *Writ*, the Histories of our own, or of other Nations, that a Subject not having contribute to the *Usurpation*, but to his Power Resisted the same, when the said unjust *Usurpation* prevailed, expelled the lawful Magistrat, detained their unjust Possession for many years, and Tyrannized over the People, whom the lawful Magistrat could not for the time Protect or Help, that the said Subject for his compliance, and using Indeavours for necessar, publick, and self Preservation, should be Indyted of so high a Crime, is in all humility conceived without Precedent or Parallel, and quite contrair to the current of Example and Practice that may be from *Scripture* and other Historie adduced, and not so suitable to that innate Goodness and natural Clemency, whereof his Majesty has given so abundant Proof to others, even the *Usurpers* and *Invaders*, and who aided and abaited them (without Envy be it spoken) and which is not only most agreeable to his Majesties most Gracious Inclination, but very suitable to that Advice given by his Royal Father, to him in his *Letter Basilian* whose Words in one Section, there are as follows. *Your Prerogative is best shewed and exercised in remitting, rather than exacting the Rigour of the Law, than which nothing is worse*; In respect whereof, and of the Defences abovewritten, the Defender ought to be Affoizied from this Libel, and hail *Articles* therein contained.

9. The Defender ought to be Affoizied from thir two last *Articles* as from all the other, from the year 1641, to his Majesties home-coming to *Scotland* in anno 1650, because of the *Ratification* and *Oblivion* contained in his Majesties Treaty at *Breda*, and most full and ample *Act of Ratification* and *Oblivion* at *St. Johnstoun* and *Stirling Annis* 1650, and 1651.

And yet that the Defenders Innocency as to any Accession or Knowledge of that horrid Murther may yet farther appear; It is known to many Persons, and to some of the Members of this present *Parliament*, that when *Cromwel* was in *Scotland* in anno 1650, (notwithstanding it is known what Malice he had to the Defender at that time) in this Particular he expressed himself concerning the Marquis of *Argyle*, that he thought him a Man that had neither Courage nor Honour to have been upon such a Business. And the Defender thanks GOD he had so much Honour and Honesty, as in no way to be Accessory thereto, but to Abhorre the same.